Selected Post-*Booker* Decisions

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INTRODUCTION

Since the Supreme Court decided *United States v. Booker*, 125 S. Ct. 738 (2005), on January 12, 2005, every circuit and numerous district courts have given their interpretation of several aspects of the opinion. This memo explores substantive post-*Booker* circuit court opinions and highlights representative opinions from some district courts. It is not meant to be exhaustive of all decisions discussing the varied issues raised by the *Booker* opinion, and only cases which were available on Westlaw, Lexis-Nexis, and PACER through March 16, 2005, are included.

CIRCUIT COURT OPINIONS

I. First Circuit

Plain Error Standard

United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. Feb. 22, 2005)[1]

In *Antonakopoulos*, Circuit Court Judges Selya, Stahl and Lynch set forth the standard of review for unpreserved claims of sentencing errors after *Booker*. The defendant in the present case argued that *Booker* automatically required resentencing because the sentencing court rather than the jury made the factual findings which enhanced his sentence. The court found that "[t]he error [was] not that a judge (by a preponderance of the evidence) determined facts under the Guidelines which increased the sentence beyond that authorized by the jury verdict or an admission by the defendant; the error [was] only that the judge did so in a mandatory Guidelines system." *Id.* at 75.

The court stated for all unpreserved claims of *Booker* error, it intended to apply conventional plain-error doctrine, where the *Booker* error is that the defendant's guideline sentence was imposed under a mandatory system.[2] The court determined that the first two *Olano* prongs for a plain error finding will be met whenever the sentencing court treated the guidelines as mandatory. For the third prong, the court found that *Olano* makes it clear that under a plain-error analysis, it is the defendant who bears the burden of persuasion with respect to prejudice. And, to meet both the third and forth prongs, the court asserted that in its view, ordinarily the defendant "must point to circumstances creating a reasonable probability that the district court would impose a different sentence more favorable under the new 'advisory Guidelines' *Booker* regime." *Id.* (*citing United States v. Dominguez-Benitez*, 124 S. Ct. 2333 (2004)). The court rejected a *per se* remand rule solely on the basis that a sentence was enhanced by judicial fact-finding, disagreeing with the Fourth Circuit in

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[1] Although the official citation form would not include the date of the decisions, these dates are being provided in this document as an aid to the reader.

[2] In *United States v. Olano*, 507 U.S. 725 (1993), the Supreme Court held "[t]here must be an 'error' that is 'plain' and that 'affect[s] substantial rights.' Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 732.

United States v. Hughes I and the Sixth Circuit in *United States v. Milan* and *United States v. Oliver*, discussed in Parts IV and VI below. *Id.* at 79. The court found that standing alone, judicial fact-finding is insufficient to meet the third and forth prongs of *Olano*, because nothing in *Booker* requires submission of the facts to a jury, so long as the guidelines are not mandatory. *Id.* Therefore, the court also rejected a *per se* remand rule solely on the basis that the guidelines are no longer mandatory. In the court's view, it cannot be said that all sentences imposed before *Booker* threatened the fairness, integrity, or public reputation of judicial proceedings or undermined confidence in the outcome of the sentence simply because the guidelines were mandatory. *Id.* at 80.

In considering all future appeals in which remand may be warranted, the court asserted the following; first, where it engages in a plain-error review and finds it clear that the sentencing court has made an error under the guidelines, there is a strong argument for remand; second, where a district judge has expressed that the sentence imposed was unjust, grossly unfair, or disproportionate to the crime committed and that he would have sentenced otherwise if possible, there is a powerful argument for a remand; and third, even in cases where the sentencing judge is silent, there may be cases in which the appellate panel is convinced by the defendant, based on the facts of the case, that the sentence would, with reasonable probability, have been different such that both the third and fourth prongs are met, and thus a remand will be warranted. *Id.* at 81-82.

United States v. Serrano-Beauvaix, 2005 WL 503247 (1st Cir. March 4, 2005)

In *Serrano-Beauvaix*, the defendant pleaded guilty to charges of conspiracy to distribute in excess of five kilograms of cocaine, and in the plea agreement, he stipulated to being personally responsible for one kilogram of cocaine, agreed to certain enhancements including a role enhancement, and acknowledged he did not qualify for the safety valve. Writing for the court, Circuit Judge Lynch found with respect to the role enhancement, the defendant had not met his burden of showing there was a "reasonable probability" that he would be sentenced more leniently under an advisory system because he waived his challenge by stipulating to the conduct. Further, where the sentencing court sentenced the defendant to the bottom end of the guideline range at 63 months with a statutory minimum of 60 months, the court found that because even post-*Booker*, the sentencing court must consult the guidelines and take them into account at sentencing, the defendant failed to meet his burden to show that the court would have imposed a different and more favorable sentence under the new post-*Booker* advisory system. *Id.*

Circuit Judge Lipez concurred, but stated he did not believe the court should require defendants who invoke unpreserved *Booker* errors to make a specific showing of prejudice to satisfy the third prong of plain-error review. Instead, he believes such error should entitle the defendant to a presumption of prejudice, which the government can then rebut; the same approach adopted by a panel of the Sixth Circuit in *United States v. Barnett*, 2005 WL 357015 (6th Cir. Feb. 16, 2005), discussed in Part VI below. Judge Lipez stated this approach has also been applied by sister circuits in other contexts "where the inherent nature of the error made it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred." *Id.*

II. Second Circuit

A. Plain Error Standard

United States v. Crosby, 397 F.3d 103 (2d Cir. Feb. 2, 2005)[3]

In *Crosby*, Circuit Judges Newman, Kearse, and Cabranes engaged in a detailed analysis of federal sentencing law prior to *Booker* and *Fanfan* and discussed at length the *Booker* and *Fanfan* opinions. The court then opined that after *Booker* and *Fanfan*, sentencing courts remain under a continuing duty to "consider" the guidelines by first determining the guideline range in the same manner as before *Booker* and *Fanfan*. *Id.* at 112. Once this range has been determined, the sentencing court has the duty under 18 U.S.C. § 3553(a)(4), to "consider" the range, along with the factors of section 3553(a). *Id.* The court stated that in this instant appeal, it did not need to determine what degree of consideration is required or what weight should be given to the guidelines, because "[w]e think it more consonant with the day-to-day role of district judges in imposing sentences and the episodic role of appellate judges in reviewing sentences, especially under the now applicable standard of 'reasonableness,' to permit the concept of 'consideration' . . . to evolve as district judges faithfully perform their statutory duties. Therefore, we will not prescribe any formulation a sentencing judge will be obliged to follow in order to demonstrate discharge of the duty to 'consider' the Guidelines." *Id.* at 113.

With respect to appellate review of sentences post-*Booker*, the court noted that the review for reasonableness is not limited to a consideration of the length of a sentence, and that a sentence will not be reasonable if legal errors led to its imposition. *Id.* at 114. The possibility of a sentence which is unreasonable for legal error in the method of its selection concerned the court because it will be impossible to tell whether the sentencing court would have imposed the same sentence had it not been compelled to impose a guideline range. *Id.* at 15. The court then declined to fashion any *per se* rule as to the reasonableness of every sentence within an applicable guideline range or the unreasonableness of every sentence outside the applicable guideline range, because it found that such a *per se* rule would "risk being invalidated as contrary to the Supreme Court's holding in *Booker/Fanfan*, because [that] would effectively re-institute mandatory adherence to the Guidelines." *Id.* Additionally, the court noted that even if, prior to *Booker*, a sentencing court had indicated an alternative sentence that would be imposed if compliance with the guidelines were not required, the alternative sentence would not necessarily be the same one the court would have imposed in compliance with the duty to consider all factors listed in § 3553(a). *Id.* at 118.

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[3] On February 4, 2005, the Second Circuit issued a "Special Order of Inquiry to Appellants Regarding Remand Pursuant to *United States v. Crosby*," which explains that *United States v. Crosby* sets forth the post-*Booker* procedures for "remand for reconsideration" that are to be applied to all cases held since *Blakely*, and asks attorneys to complete a form indicating whether a defendant seeks a remand for sentence reconsideration. Available at: http://www.ca2.uscourts.gov/Docs/News/Post-Crosby%202.4.050001.pdf

Finally, the court laid out in detail its plan for how it will handle all post-*Booker* appeals on direct review. It concluded that it was appropriate, for all pre-*Blakely* and pre-*Booker* sentences pending on direct review, to remand to the district court "not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine *whether* to resentence, now fully informed of the new sentencing regime, and if so, to resentence." *Id.* at 117 (emphasis in original). It stated that a remand for determination of whether to resentence is appropriate in order to undertake a proper application of the plain error and harmless error doctrines. *Id.* at 118. "In short, a sentence imposed under a mistaken perception of the requirements of law will satisfy plain error analysis if the sentence imposed under a correct understanding would have been materially different. It is readily apparent to us that a sentence imposed prior to *Booker/Fanfan* was imposed without an understanding of sentencing law as subsequently explained by the Supreme Court. However, we cannot know whether a correct perception of the law would have produced a different sentence. . . . If a district court determines that a nontrivially different sentence would have been imposed, that determination completes the demonstration that the plain error test is met." *Id.*[4]

B. Revocation of Supervised Release

United States v. Fleming, 397 F.3d 95 (2d Cir. Feb. 2, 2005)

Circuit Judge Newman determined in *Fleming* that the sentencing court did not err in its consideration of relevant sentencing factors or in the length of the sentence imposed after the defendant's third violation of conditions of his supervised release. Acknowledging that *Booker* excised and severed 18 U.S.C. § 3742(e), which specified standards for appellate review, the court looked to section 3583(e) which requires a judge to consider most of the factors listed in section 3553(a) in a revocation of supervised release, including applicable policy statements. *Id.* at 97-98. In this case, the recommended term of imprisonment under §7B1.1(a)(3) was 5 to 11 months, and the sentencing court imposed a two year term of imprisonment. *Id.* at 99. The court stated once the Supreme Court excised section 3742(e), which included a "plainly unreasonable" review for sentences for which there was no guideline, *Booker*'s announced standard of reasonableness is to be applied "not only to review of sentences for which there are guidelines but also to review sentences for which there are no applicable guidelines." *Id.* The court found that as long as the sentencing judge was aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates a misunderstanding about their relevance, the court would accept that the requisite consideration under section 3583(e) has been met, and further found that "reasonableness" in the context of review of sentences is a flexible concept. *Id.* at 100. Under the circumstances in the present case, the court did not find the two year sentence to be unreasonable. *Id.* at 101.

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[4] On February 11, 2005, in *United States v. Konstantakakos*, 2005 WL 348376 (2d Cir. Feb. 11, 2005), the Second Circuit conducted a more detailed plain error review, citing the four prongs the defendant is required to demonstrate, as stated in *Olano*.

The court distinguished this case from *United States v. Crosby*, discussed above, wherein it had observed that in many cases, it will not be possible to tell whether the sentencing judge would have given a different sentence if it had been fully informed of the applicable requirements of the Sentencing Reform Act (SRA) and *Booker*. In the present case, the court stated that although it had remanded in *Crosby* to afford the sentencing court an opportunity to consider whether to resentence, here, the sentencing court was functioning under Chapter Seven of the guidelines which was advisory even before *Booker*, and knowing it was not bound by the policy statements, had chosen to exercise its discretion. *Id.*

III. Third Circuit

A. Plain Error Standard

The Third Circuit has not yet ruled on the plain error standard of review for sentencings pursuant to *Booker*. Instead, the circuit's judges have held that with respect to alleged sentencing errors, the issue is best determined by the district court in the first instance, vacating the sentence and remanding for resentencing, doing so first in *United States v. Mortimer*, 2005 WL 318650 (3d Cir. Feb. 10, 2005), discussed more fully below.[5]

B. Criminal History Calculation

United States v. Ordaz, 398 F.3d 236 (3d Cir. Feb. 23, 2005)

In a case involving conspiracy to distribute cocaine where the jury was not asked to render a decision about drug weight nor asked to make a determination of the defendant's criminal history, the defendant appealed, arguing that the sentencing court improperly enhanced his sentence on the basis of those factors because the enhancements were not supported by facts found by the jury beyond a reasonable doubt. *Id.* at 238. The court found that with respect to the sentencing court's determination of drug weight, the issue was best determined by the sentencing court in the first instance, and therefore vacated the sentence and remanded. However, the court rejected the defendant's argument that the fact of a prior conviction must be submitted to the jury, and disagreed that *Blakely* made clear that *Almendarez-Torres* cannot stand. *Id.* at 241. Although the court

[5] The court has since followed the line of reasoning that *Booker* issues are "best determined by the district court in the first instance" in subsequent opinions without further substantive discussion. In *United States v. Able*, 2005 WL 428758 (3d Cir. Feb. 24, 2005), Circuit Judges Greenberg, Sloviter and Fuentes determined that the sentencing court treated the guidelines as mandatory rather than advisory, because it stated in its statement of reasons that "[t]he sentence is within the guideline range, the range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by the application of the guidelines." *Id.* at *1. Therefore, because the court determined that the defendant's sentencing issues are best determined by the district court in the first instance, it remanded for resentencing. *Id.* In *United States v. Marquez*, 2005 WL 455858 (3d Cir. Feb. 28, 2005), in an opinion written by Circuit Judge Aldisert, he and Circuit Judges Sloviter and Ambro stated that the unspecified sentencing issues challenged by the defendant were best determined by the district court in the first instance, and therefore vacated the sentence and remanded for resentencing. *Id.* at *2.

determined there was tension between "the spirit of *Blakely* and *Booker* that all facts that increase the sentence should be found by the jury and the Court's decision in *Almendarez-Torre*s, which upholds sentences based on facts found by judges rather than juries," because it found that the holding in *Almendarez-Torres* remains binding law and nothing in *Blakely* or *Booker* holds otherwise, it held that the sentencing court's determination regarding the facts of the defendant's prior conviction did not violate the Sixth Amendment, "notwithstanding that the sentences were based, in part, on facts found by a judge rather than a jury." *Id.*

C. Drug Quantity Calculation

United States v. Mortimer, 2005 WL 318650 (3d Cir. Feb. 10, 2005)

In *Mortimer*, the defendant raised issues concerning *Blakely* in a Motion for Summary Remand, claiming the sentencing court made factual findings regarding the quantity of drugs he possessed. Circuit Judge Van Antwerpen had originally denied the motion in August of 2004, but held the case pending a resolution of the *Blakely* matter. *Id.* at *4. Without substantive discussion, the court found that the defendant raised sentencing issues which are best determined by the district court in the first instance. Therefore, the court remanded for resentencing. *Id.*

D. Concurrent Sentence Rule

United States v. Fisher, 2005 WL 271541 (3d Cir. Feb. 4, 2005)

In *Fisher*, the defendant pleaded guilty to two federal and two state charges which were consolidated for sentencing, and he was sentenced to concurrent terms of 96 months' imprisonment. He had waived his right to appeal the state convictions in a plea agreement. *Id.* at *1. In the instant appeal, he claimed an enhancement given for one federal crime for "sophisticated means" was improper because it relied on judicial fact-finding beyond facts he had admitted. *Id.* at *3. District Judge Shadur, sitting by designation, found that the sentence imposed for this federal crime was identical to the sentence imposed for the state crimes, and because his sentences for those crimes were final, *Booker* offered him no relief. *Id.* at *9. Any constitutional challenge to the sentence imposed for the federal crime which runs concurrently with the sentence for the state crimes was moot and no relief that could be granted would have any affect. *Id.* The court further stated that in any future federal prosecution of the defendant, the calculation of his criminal history score would consider the sentences imposed in the three cases as "one sentence" for purposes of §4A1.2(a)(2), using the longest of the sentences for the calculation. Thus, any reduction of the sentence in this case would have no effect on his future criminal history category, and there was no benefit to be gained from a favorable ruling on his Sixth Amendment challenge. Therefore, the court declined to review the sentence. *Id.* at *4.

IV. Fourth Circuit

A. Plain Error Standard

United States v. Hughes I, 396 F.3d 374 (4th Cir. Jan. 24, 2005)

In *Hughes I*, the sentencing court imposed a 46-month sentence when the guideline range authorized by the jury finding was a 6- to 12-month sentence. Chief Judge Wilkins and Judges Traxler and Gregory found that the court plainly erred by imposing the sentence because it exceeded the maximum authorized by the jury finding alone, and therefore it violated the Sixth Amendment. *Id.* at 374. The court also found the error was prejudicial, and that the sentence warranted reversal because sentencing courts are no longer bound by the guidelines. *Id.* at 376. According to the court, under the record before it, to leave the sentence standing would put in jeopardy the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 381. Although the court found that the district court did not err in its initial calculation of the guideline range, it held that in light of *Booker*, the sentence must be vacated and remanded. *Id.* at 385. The court directed the sentencing court upon remand to consider the guideline range as well as other relevant factors set forth in the guidelines, and those factors in section 3553(a), before imposing the sentence. *Id.*

United States v. Hughes II, 2005 U.S. App. LEXIS 4331 (4th Cir. March 16, 2005)

Upon rehearing, the panel filed an amended opinion to *Hughes I*, in which it found plain error and vacated and remanded for resentencing, "consistent with the remedial scheme set forth in Justice Breyer's opinion for the Court in *Booker*." *Id.* at *6. The court noted that since its initial decision in *Hughes I*, many other circuit courts have ruled that "an assessment of whether the defendant has been prejudiced by the Sixth Amendment error must account for the fact that any resentencing will be conducted pursuant to the remedial scheme announced in *Booker*," and have held that if the defendant cannot show that the sentencing court would have imposed a different sentence under an advisory scheme, the Sixth Amendment error did not affect the defendant's substantial rights. *Id.* at *18 (citing *Crosby*, discussed in Part II above, and *United States v. Mares, United States v. Paladino*, and *United States v. Rodriguez*, discussed in Parts V, VII, and XI below, respectively).

The court took special notice of the Eleventh Circuit's discussion in *Rodriguez* in which it had claimed the *Hughes* court failed to recognize "the prejudice inquiry must focus on what has to be changed to remedy the error." *Id.* at *20 (*quoting Rodriguez*, at 1303). The court disagreed with the analysis in *Rodriguez* that the refusal to incorporate the remedial scheme "'is wrong because it disconnects the error to be remedied on remand from the decision of whether there is to be a remand.'" *Id.* The *Rodriguez* court had additionally argued that the function of the third plain error prong is to prevent a remand for additional proceedings where the defendant cannot show there is a reasonable probability "'that a do-over would more likely than not produce a different result.'" *Id.* (*quoting Rodriguez*, at 1302). In the court's view, the Eleventh Circuit displayed a fundamental misunderstanding of what it means for an error to affect a defendant's substantial rights. "Any inquiry into whether a Sixth Amendment error affected a defendant's substantial rights must take

as a given" that the sentencing court exceeded the Sixth Amendment limitation. *Id.* at *21. The court believes the prejudice inquiry in the case of a Sixth Amendment violation is instead whether the sentencing court could have imposed the sentence it imposed without exceeding that Sixth Amendment limitation; if the answer is yes, the defendant failed to demonstrate an effect on his substantial rights, but if the answer is no, the defendant has made the requisite showing. *Id.* at *22-23.

The court further stated that an incorporation of the remedial scheme into a prejudicial analysis would be contrary to circuit precedent, and that "[c]onsidering the *Booker* remedy in determining whether a defendant has established an effect on substantial rights from a pre-*Booker* Sixth Amendment violation would essentially require us to disregard the Sixth Amendment." *Id.* at *23. Additionally, the court concluded that *Booker* supports its view that the defendant's Sixth Amendment claim should be analyzed "without reference to the remedial scheme," and therefore it declined to consider such scheme when it assessed whether the defendant had shown he was prejudiced by a violation of his Sixth Amendment rights. *Id.* at *27.

Regarding the fourth prong, the court determined it would exercise its discretion because the failure to do so would result in a miscarriage of justice affecting the fairness of judicial proceedings. *Id.* at *37. As a result of the plain and prejudicial Sixth Amendment error, the defendant was sentenced to a term of imprisonment nearly four times as long as the maximum sentence authorized by the jury verdict. The court reasoned that although the record did not provide any indication what sentence the sentencing court would have imposed had it treated the guidelines as advisory, there was nothing in the record to compel a conclusion that the defendant would receive the same sentence on remand. However, that possibility was not enough to dissuade the court from noticing the error. *Id.* at *38.

Finally, the court determined that the *Rodriguez* court failed to appreciate that post-*Booker*, there are two potential errors in a sentence imposed pursuant to the pre-*Booker* mandatory guideline scheme; a Sixth Amendment error, which the defendant in the instant case raised, and an error for failing to treat the guidelines as advisory, which the defendant did not raise. *Id.* at *28. "The creation of the *Booker* remedial scheme thus gave rise to a separate class of error, namely, the error of treating the guidelines as mandatory." *Id.* In the court's view, "such an error is distinct from the Sixth Amendment claim that gave rise to the decision in *Booker*, and it is non-constitutional in nature" and can be asserted even by those defendants whose sentences do not violate the Sixth Amendment. *Id.* at *29.

United States v. Gilchrist, 2005 U.S. App. LEXIS 3945 (4th Cir. March 8, 2005)

In *Gilchrist*, the court remanded for resentencing pursuant to *Hughes I* in an opinion for the court by Senior Circuit Judge Hamilton, with concurrences by Circuit Judges Neimeyer and Luttig, on the same day the panel in *Hughes I* granted a rehearing. In his concurrence, Judge Luttig stated he did not believe the remand to be absolutely necessary, and explained why he believed the court fundamentally erred in its decision in *Hughes I*. *Id.* at *2. Specifically, he determined the *Hughes I*

panel erred in its identification of the error, whether the error affected Hughes' substantial rights, and in its decision to exercise its discretion to recognize the error, thereby misapplying the plain error doctrine. *Id.* at *4.

Judge Luttig explained that the panel's mistake was in not considering as error the sentencing court's application of the guidelines in their mandatory form, but instead as the imposition of a sentence based on facts found by the judge, thereby failing to take into account both the entirety of the holding in *Booker* and that the central premise of *Booker* is that if the guidelines could be read as advisory, the selection of a particular sentence based on differing sets of facts would not implicate the Sixth Amendment. *Id.* at *8. Judge Luttig pointed out that despite the fact there was no Sixth Amendment violation in Fanfan's case, the Court vacated and remanded in order to permit the government to seek resentencing, based on the extra-verdict facts that the district court refused to consider. *Id.* at *9. Further, Judge Luttig stated that the *Hughes I* panel erred by holding that the defendant's substantial rights were violated because he would have received a lower sentence had the sentencing court imposed a sentence in accordance with the facts found by the jury. *Id.* at *11. "[P]rejudice must be determined by comparing what the district court did under a mandatory regime to 'what the district court would have done had it imposed a sentence in the exercise of its discretion pursuant to § 3553(a)' . . . an inquiry expressly rejected in *Hughes*." *Id. (quoting Booker*, at 380). Finally, Judge Luttig stated the *Hughes I* panel erred in exercising its discretion to notice the error on the ground that *Booker* wrought a major change in how sentencing is to be conducted, stating the panel's conclusion would compel remand in every case where the court must apply Rule 52(b) to *Booker* errors. *Id.* at *15. In his view, the *Hughes I* panel's defense of its exercise of discretion, resting not on the presence of a Sixth Amendment violation, applies to all sentences imposed prior to *Booker*, even those imposed at the court's direction in *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004), because even in those cases, the sentences were not imposed under a regime in which the guidelines were treated as advisory. *Id.* at *15-16.

United States v. Washington, 398 F.3d 306 (4th Cir. Feb. 11, 2005)

In *Washington*, Circuit Judges Niemeyer, Luttig and King determined that the plain error test was satisfied in that the judicial fact-finding leading to an enhancement for obstruction of justice resulted in a sentence exceeding the maximum sentence authorized by the jury verdict pursuant to the then-mandatory guidelines. *Id.* at 312. Further, the court found the error was prejudicial and affected the defendant's substantial rights because the enhancement led to a greater sentence than authorized. *Id.* Quoting from *Hughes I*, above, the court stated "'the fact remains that a sentence has yet to be imposed under a regime in which the Guidelines are treated as advisory,' and '[w]e simply do not know how the district court would have sentenced [the defendant] had it been operating under the regime established by *Booker*.'" *Id.* at 313 *(quoting Hughes I*, at 37, n. 8). Therefore, the court vacated the sentence and remanded for resentencing. *Id.*

B. Alternative Sentence Imposed Pursuant to *United States v. Hammoud*

United States v. Doane, 2005 WL 327559 (4th Cir. Feb. 11, 2005)

In *Doane*, the defendant was sentenced after *Blakely*, and pursuant to *United States v. Hammoud*, the sentencing court also specified an alternative sentence. The appeal was held in abeyance pending the decision in *Booker*. *Id.* at *1. The defendant moved for an expedited remand of his case to implement the alternative sentence, noting that he had already served more time than the district court set forth in that alternative sentence. *Id.* The court granted the motion for remand to allow the district court to reconsider the defendant's sentence in light of *Booker* and *Hughes I*. *Id.*

V. Fifth Circuit

Plain Error Standard

United States v. Mares, 2005 WL 503713 (5th Cir. March 4, 2005)

In *Mares*, in an opinion written by Circuit Judge Davis and circulated to all members of the court, Circuit Judges Jolly, Davis, and Clement agreed with the Eleventh Circuit in *United States v. Rodriguez*, 2005 WL 272952 (11th Cir. Feb. 4, 2005), discussed in Part XI below, and found that the defendant did not meet the third prong of the plain error test because he could not show his sentence affected the outcome of his proceedings, and therefore, the sentence should be affirmed. *Id.* at *1. The court stated that it was the mandatory aspect of the sentencing scheme prior to *Booker* which violated the Sixth Amendment's requirement of a jury trial, but that even in the discretionary sentencing system established by *Booker*, a sentencing court must still carefully consider the statutory scheme created by the SRA and the guidelines. *Id.* at *6. The duty to consider the guidelines, in the court's view, will ordinarily require the sentencing judge to determine the applicable guideline range even though the judge is not required to sentence within that range. *Id.* The court stated that *Booker* contemplates that with the mandatory use of the guidelines excised, the Sixth Amendment will not impede a sentencing judge from finding all facts relevant to sentencing, and the judge is entitled to find by a preponderance of the evidence all those facts relevant to the determination of the guideline range and to the determination of a non-guideline sentence. *Id.* at *7.

In the present case, the court found that the defendant did not meet the third prong of the plain error test because he did not demonstrate a probability "sufficient to undermine confidence in the outcome," where the sentencing judge imposed the statutory maximum sentence when the bottom of the guideline range was lower. *Id.* at *9. The court found no indication in the record other than that to explain whether the sentencing judge would have reached a different conclusion if the guidelines were advisory. Therefore, the court found the defendant could not meet his burden of demonstrating that the result would likely have been different had the judge sentenced him under the post-*Booker* scheme. *Id.*

The court also explained how it will conduct future sentencing reviews. If the sentencing judge exercises the discretion to impose a sentence within a properly calculated guideline range, in the court's reasonableness review, it will infer that the judge considered all the factors for a fair sentence set forth in the guidelines, and given the deference due that discretion, it will be rare for a reviewing court to say such a sentence is unreasonable. *Id.* at *7. Further, when the judge exercises her discretion to impose a sentence within the guideline range, and states so on the record, little explanation is required by the court. However, when the judge elects to give a non-guideline sentence, he or she should carefully articulate fact-specific reasons that the sentence selected is appropriate. *Id.* The court stated it will give due deference to a sentence if the sentencing court follows these principles, commits no legal errors, and gives appropriate reasons for the sentence. *Id.*

VI. Sixth Circuit

A. Plain Error Standard

United States v. Oliver, 397 F.3d 369 (6th Cir. Feb. 2, 2005)

In *Oliver*, Circuit Judges Moore and Gibbons and District Judge Mills found the sentencing court had plainly erred in increasing the defendant's sentence pursuant to the guidelines, in violation of the Sixth Amendment, and remanded in accordance with *Booker*. *Id.* at 373. The court found that all four prongs of the plain error test had been met; first, an error occurred because the guidelines were mandatory at the time the sentence was imposed and are currently advisory; second, that error was plain because the Supreme Court has held that an error need not always be obvious at the time of the determination as long as it is evidently plain at the time of appellate consideration; third, the error affected the defendant's substantial rights because the sentencing court's determination unconstitutionally increased the defendant's sentence beyond that which was supported by the jury verdict and the defendant's criminal history; and fourth, the sentencing error that led to a violation of the Sixth Amendment by the imposition of a more severe sentence than that supported by the jury verdict would diminish the integrity and public reputation of the judicial system. *Id*. at 379-80.

United States v. Bruce, 396 F.3d 697 (6th Cir. Feb. 3, 2005)

In a footnote in *Bruce*, Circuit Judges Nelson and Cook and District Judge Rosen stated that although the guidelines are no longer mandatory under *Booker*, it remained an important part of the appellate review process to determine what the guidelines would call for under the specific facts and circumstances of each case. *Id.* at 711, n. 10. In that analysis, the court opined that the sentence imposed, with an enhancement for obstruction of justice by a preponderance of the evidence based on judicial fact-finding, contravened the defendant's Sixth Amendment right to a jury finding of all facts beyond a reasonable doubt. *Id.* at 718. The court applied a plain error standard of review, finding first, although the lower court's error was not apparent until *Booker*, both the Supreme Court and this court had previously recognized that whether an error is plain is satisfied as long as the error is evident at the time of the appellate review. *Id.* at 719. The court then left unresolved the question

whether the error affected the defendant's substantial rights, because it found the fourth prong of the test, whether the error seriously affected the fairness, integrity or public reputation of judicial proceedings, had not been met, creating an inner-circuit split on this issue with *United States v. Oliver*, discussed above. *Id.* Specifically, the court found guidance from prior decisions which had held an *Apprendi* violation does not satisfy the fourth prong if the evidence bearing upon the issue that was impermissibly determined by the lower court was overwhelming and uncontroverted. *Id.* In that vein, the court found that because the sentencing court had sentenced the defendant at the top of the guideline range within a mandatory sentencing scheme, it was not inclined to have imposed a shorter sentence regardless of its power to do so under a more open-ended advisory scheme. *Id.* at 720. Therefore, the court affirmed the defendant's sentence.

United States v. Milan, 398 F.3d 445 (6th Cir. Feb. 10, 2005)

Circuit Judge Clay vacated the sentence and remanded for resentencing in *Milan* where the defendant only admitted to conspiring to possess with intent to distribute 50 grams or more of a mixture or substance containing cocaine base, and the sentencing court attributed at least 1.5 kilograms of crack cocaine to him for sentencing purposes. *Id.* at 449. The sentencing court had originally determined a base offense level of 38 applied, then applied a 2-level enhancement upon the government's allegation that the defendant possessed a firearm; a 4-level enhancement because he was an organizer or leader; a 3-level reduction for acceptance of responsibility; and a 4 level reduction based on a §5K1.1 motion for substantial assistance, for an adjusted offense level of 37 and a criminal history category of II, warranting a sentence between 235 and 293 months. The court imposed a sentence of 264 months. *Id.* Two years after the sentence was imposed, the government filed a second motion for a reduction in the defendant's sentence under §5K1.1, and his sentence was further reduced to 188 months. *Id.* The court found that the defendant's sentence was the result of plain error because, in part, the error determined the outcome of the sentencing court proceedings, stating "[i]t is clear that had the district court not found facts on its own at sentencing, which under *Booker* constitutes a violation of the Sixth Amendment, [the defendant's] sentence would have been materially different." *Id.* at 452.

The court acknowledged that while its plain error analysis agreed with the recent decision in *Oliver*, above, it was not in keeping with that circuit's decision in *Bruce*, above. Citing to a Sixth Circuit Rule, in a footnote, the court stated "[t]o the extent *Bruce* conflicts with *Oliver*, we note that we must follow *Oliver* because it was decided first." *Id.* at 453, n. 3 (*citing* 6th Cir. R. 20(c)). The court also acknowledged the existence of a circuit conflict on the question of plain error analysis, with two circuits concluding that because the *Booker* remedy was to render the guidelines advisory instead of invalidating them in their entirety or grafting a sentencing jury requirement on to them, *Booker*-type violations may not constitute plain error. *Id.* (*citing United States v. Rodriguez*, 2005 WL 272952 (11th Cir. Feb. 4, 2005) and *United States v. Crosby*, 2005 WL 240916 (2d Cir. Feb. 2, 2005)). In the court's analysis, in the Eleventh Circuit, most Sixth Amendment errors will not result in remands for resentencing because the defendant will not be able to demonstrate a reasonable probability that he was prejudiced by the error. *Id.* The court did not agree with the Eleventh's Circuit's decision in *Rodriguez*, in which the court found the defendant's sentence did not affect his

substantial rights. Additionally, the court noted that in the Second Circuit's approach to remand all cases in *Crosby*, the sentencing court is not to automatically resentence but is to conduct a plain or harmless error inquiry in order to determine whether it ought to resentence or not. The court took issue with this decision, noting that the *Booker* court had instructed "reviewing courts" to determine whether a sentencing error was plain. *Id.*

United States v. Hamm, 2005 U.S. App. LEXIS 3796 (6th Cir. March 8, 2005)

The court in *Hamm* remanded for resentencing, concluding the sentence imposed was invalid even though the sentence was based solely on facts admitted by the defendant in his guilty plea. Under a plain error test, the court found that the first two requirements were met in that the court imposed the sentence under a mandatory system. Although not a violation of the defendant's Sixth Amendment rights, the court found the case analogous to *Fanfan*. *Id.* at *7. Because the judge expressed sympathy for the defendant and stated that he was bound under the law to how far he could go from the guideline range, the court believed the sentencing court might have sentenced the defendant to a shorter sentence if it had felt it were free to do so. Therefore, the court concluded that the defendant's substantial rights were affected. *Id.* at *9. Finally, the court found that an exercise of its discretion was appropriate given that "[w]e would be usurping the discretionary power granted to the district courts by *Booker* if we were to assume that the district court would have given [the defendant] the same sentence post-*Booker*." *Id.* at *11.

B. Drug Quantity Calculation

United States v. Hines, 2005 U.S. App. LEXIS 1906 (6th Cir. Feb. 7, 2005)

Circuit Judges Cole and Clay and District Judge Hood found in *Hines* that although the sentencing court's factual findings were supported by the record, the defendant was entitled to a resentencing under *Booker*. *Id.* at *19. The defendant and a codefendant were convicted of conspiracy to distribute 500 grams or more of methamphetamine, and at sentencing, the court determined the defendant possessed 32 pounds of methamphetamine during the course of the conspiracy and that he was subject to a firearm enhancement. The court sentenced the defendant to 235 months' imprisonment. *Id.* at *5. The jury had heard evidence that the defendant was responsible for between 5 to 15 kilograms of methamphetamine and that he had possessed a firearm during the relevant time period, and the government argued that any error under *Booker* was harmless and did not affect the defendant's substantial rights because such evidence must have been accepted by the jury. *Id.* at *23. The court found that the government's argument ignored the applicability of *Booker* and stated the fact that the jury heard such evidence was immaterial because the jury did not make any specific factual finding, and it was improper to speculate. *Id.* at *24. Because appellate courts should review and not determine the decision of the sentencing court, the court vacated and remanded for resentencing. *Id.* at *26.

C. Career Offender

1. Section 924(c) Firearm-Type Provision

United States v. Harris, 397 F.3d 404 (6th Cir. Feb. 8, 2005)

In *Harris*, Circuit Judge Moore, writing for herself and Judges Gilman and Keith, determined that *Booker* extends to judicial fact determinations under 18 U.S.C. § 924(c), and held that the Firearm-Type Provision mandatory minimum in §2K2.4(b) is not binding on a sentencing court unless the type of firearm involved in the offense is charged in the indictment and proven to a jury beyond a reasonable doubt. *Id.* at 406. The court stated that the Supreme Court had earlier implied that section 924(c) sets forth a statutory maximum sentence of life in prison regardless of whether the sentencing court finds any of the factors enhancing the required minimum. *Id.* at 411 (*citing Harris v. United States*, 536 U.S. 545 (2002)). The court also stated that unlike most guideline provisions which provide for overlapping ranges, the provision relating to section 924(c) does not provide for ranges but instead mandates that except when a defendant qualifies as a career offender under §4B1.1, the guideline sentence is the minimum term of imprisonment required in the statute. *Id.* Finding that *Booker* applies to judicial fact determinations under the guidelines, although the Supreme Court did not address whether *Booker* applies to fact determinations under statutory provisions, the court determined the pertinent question was how to reconcile the guideline's now recommendation for the minimum sentence in a factual situation with the possibility of a maximum sentence of life imprisonment under section 924(c). "Given the severe constraints on imposition of a life sentence in the pre-*Booker* world, it would seem strikingly at odds with the principles set forth in *Booker* to hold that the sudden advisory nature of the Guidelines prevents the (still mandatory) provisions of § 924(c) from violating the Sixth Amendment." *Id.* at 412. Thereafter, it found that after *Booker*, the enhancement contained in the section 924 Firearm-Type Provision cannot constitutionally be imposed on the basis of judicial fact finding. *Id.*

In the court's opinion, the doctrine of constitutional avoidance counsels the court to treat the provision as setting forth elements rather than sentencing factors, and to construe it as setting forth sentencing factors would cause the court to face a serious constitutional problem due to the potential conflict with *Booker*'s Sixth Amendment ruling. "We conclude that the tradition of treating firearm type as an element . . . the sharply higher penalties involved . . . and the serious constitutional problems that would result from a contrary conclusion . . . are together sufficient to overcome the presumption, based on the structure of the statute, that § 924(c)(1)(B) is intended to set out sentencing factors rather than elements of separate crimes." *Id.* at 413. Concluding that the firearm types are elements of separate crimes, it held that *Booker* requires an enhancement based on type of firearm to be charged in the indictment and proven to a jury beyond a reasonable doubt. *Id.* at 413-14. Therefore, the court vacated the application of the enhanced section 924(c)(1)(B) penalty and remanded for re-sentencing. *Id.* at 417.

2. Section 924(e) Armed Career Criminal Act

United States v. Barnett, 398 F.3d 516 (6th Cir. Feb. 16, 2005)

In *Barnett*, the defendant was sentenced under the Armed Career Criminal Act (ACCA), found at 18 U.S.C. § 924(e), based on three prior aggravated or violent felonies. *Id.* at 521. He was sentenced to 265 months, the middle of the applicable guideline range. The defendant argued that application of the ACCA violated *Booker* because the sentencing court determined the nature of his prior convictions. Writing for the court, Circuit Judge Martin found that existing case law establishes that *Apprendi* does not require the nature or character of prior convictions to be determined by a jury. *Id.* at *524. The defendant further argued that because *Booker* made the guidelines advisory, his sentence imposed under a mandatory system should be vacated and remanded. The court reviewed the sentence for plain error, and agreed with the defendant that it was plain error to sentence him under a mandatory guideline scheme. *Id.* at 526.

Further, relying on the Supreme Court's decision in *Olano* with respect to the third prong of the plain error test, the court stated in some situations, a presumption of prejudice is appropriate if the defendant cannot make a specific showing of prejudice, thus satisfying the third prong where the inherent nature of the error made it exceptionally difficult to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred. *Id.* at 526-27. The court was convinced the instant case was such a case where prejudice should be presumed, asserting that if the sentencing court had not been bound by the guideline range, the defendant may have received a lower sentence because the court would have had the discretion under the new advisory scheme to impose a sentence as low as 180 months, the statutory minimum provided by the ACCA. Additionally, the court found it would be difficult for the defendant to show his sentence would have been different, agreeing with the Second Circuit in *Crosby*, discussed in Part II above, which had stated it would be "impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-Guideline sentence." *Id.* at 528. (*quoting United States v. Crosby*). The court held that the defendant's substantial rights were affected, and further concluded that an exercise of its discretion was appropriate because it would be fundamentally unfair to allow his sentence to stand in light of the development in the applicable legal framework. *Id.* at 530. Finally, the court declined to address the reasonableness of the defendant's sentence without first giving the sentencing court an opportunity to resentence him under the new post-*Booker* framework. *Id.* Therefore, the court vacated the sentence and remanded for resentencing.

District Judge Gwin, sitting by designation, filed a concurring opinion in which he argued that 18 U.S.C. § 3742(f)(1) *requires* a remand when a court of appeals determines a sentence was imposed in violation of law or imposed as a result of an incorrect application of the guidelines. *Id.* at 531. Additionally, Judge Gwin said the court had considered the case in light of one of the underlying principles of the plain error doctrine, the economy of judicial resources. Judge Gwin stated that he would remand the case based on minimal time needed to allow the district court to resentence the defendant under the correct guideline scheme. Specifically, he noted that the

sentencing court is already familiar with the PSR, and because there had been earlier opportunities to present evidence on disputed guideline calculations, there would be no need to reopen the case for a hearing; instead, the rehearing would simply allow the court to apply the proper standard. *Id.* at 534.

Dissenting in part, Circuit Judge Boggs stated that although he agreed with the court's conclusion that the use of a pre-*Booker* sentencing scheme was plainly erroneous, in his view, the defendant in the instant case did not show any prejudicial error in his specific sentencing. *Id.* Judge Boggs asserted that there was ample evidence on the record that the sentencing court believed the defendant's sentence was proper in light of traditional sentencing requirements, because he was sentenced in the middle of the applicable guideline range. According to Judge Boggs, "[w]ithin the guideline range, district judges have always exercised their discretion." *Id.* at 535. Had the sentencing court believed the defendant warranted a more lenient sentence, he argued, it was free to have reduced his term of imprisonment. Therefore he concluded that the mandatory nature of the guidelines at the time the defendant was sentenced did not affect the sentencing outcome, and the defendant did not demonstrate such an effect, as required. *Id.* Lastly, Judge Boggs stated that even assuming arguendo that the record was silent as to prejudice, the court should still affirm, because by stating that it "refuse[d] to speculate as to the district court's intentions in the pre-*Booker* world," it abrogated the long-held rule that "plain error review *requires* us to determine whether the outcome would be different had the law been correctly applied." *Id.* at 536 (emphasis in original). In his view, what the court dismissed as speculation was precisely the exercise that the court must undertake in a plain error review. *Id.*

3. §4B1.1 Career Offender

United States v. Gonzalez, 2005 WL 415957 (6th Cir. Feb. 22, 2005)

In *Gonzalez*, the defendant was convicted of possession with intent to distribute approximately 250 grams of cocaine, and because of two prior felony drug convictions, the sentencing court found him to be a career offender under §4B1.1, and sentenced him at the bottom of the applicable guideline range. *Id.* at *1. Writing for Circuit Judges Rogers and Duplantier, Circuit Judge Merritt found that under *Booker*, prior convictions may be used as upward adjustments without violating the Sixth Amendment prohibition on adjustments based on judicial fact-finding. *Id.* at *2. Nevertheless, the court held that *Booker* and *Fanfan* establish that the guidelines are now advisory, leaving the sentence to the reasonable discretion of the sentencing court, and opined the sentencing judge may no longer approve of the sentence imposed, based on what it found to be a particularly strong inference, where the defendant was sentenced at the bottom of the guideline range. Because it was unclear to the court what sentence the judge might impose if not bound by the career criminal provision of the guidelines, the court remanded for resentencing. *Id.*

D. Amount of Loss Calculation

United States v. Davis, 397 F.3d 340 (6th Cir. Jan. 21, 2005)

Davis came to the circuit court on direct review, and Circuit Judges Keith, Clay, and Cook stated that the sentencing judge independently made factual findings of the amount of loss which enhanced the defendant's sentence beyond the facts established by the jury verdict. The court found that just as *Booker*'s sentence was based on independent fact-finding and thus violated the Sixth Amendment, this sentence, too, violated the Sixth Amendment. *Id.* at 350-51. Therefore, the court remanded the case for resentencing.

United States v. Murdock, 398 F.3d 491 (6th Cir. Feb. 15, 2005)

In *Murdock*, the defendant contended that his sentence must be vacated because the judge decided the amount of loss without submitting the issue to the jury for a determination beyond a reasonable doubt. Judges Clay, Cook, and Bright found that there was no Sixth Amendment violation because the sentencing court's determination of the amount of loss was supported by facts admitted by the defendant. *Id.* at 501. Therefore, the court affirmed the sentence. *Id.* at 503.

E. Safety Valve Provision

United States v. Ross, 2005 U.S. App. LEXIS 3263 (6th Cir. Feb. 23, 2005)

In *Ross*, the defendant pleaded guilty to drug trafficking offenses and argued that his possession of a firearm was not relevant conduct sufficient to foreclose application of the safety valve. Specifically, he argued that *Booker* entitled him to be resentenced, and the government agreed and waived its right to argue plain error. *Id.* at *2. Circuit Judges Merritt, Daughtrey and Sutton vacated the sentence and remanded for resentencing. *Id.* The applicable guideline as determined by the sentencing court was 87 to 108 months, but one of the counts carried a statutory minimum sentence of 10 years. The defendant was sentenced to 120 months because the sentencing court decided that the safety valve could not be applied due to his possession of a firearm. *Id.* at *5-6. The defendant asserted that this finding of relevant conduct constituted a Sixth Amendment violation because it led to an increase in his sentence without a finding of the jury. *Id.* at *6. The government waived its right to argue that the defendant failed to satisfy the components of a plain-error review, stating in its brief "[p]ursuant to *United States v. Booker*, . . . the case should be remanded for resentencing." *Id.* Therefore, the court remanded the sentence for resentencing without substantive discussion. *Id.* at *6-7.

VII. Seventh Circuit

Plain Error Standard

United States v. Paladino, 2005 WL 435430 (7th Cir. Feb. 25, 2005)

In *Paladino*, the court consolidated several criminal appeals which addressed the application of the plain-error doctrine to appeals from sentences rendered under the guidelines before *Booker*. *Id.* at *1. The government conceded that all the sentences violated the Sixth Amendment right to a jury trial as interpreted in *Booker* because in all of them, the judge enhanced the sentences on the basis of facts not determined by the jury. *Id.* However, the government further argued that if a sentence was legal before *Booker* was decided, in cannot be plainly erroneous, stating that because the guidelines remain valid, a sentence that complies with them would very unlikely be reversed. *Id.* at *8. In an opinion written by Circuit Judge Posner for himself and Circuit Judges Wood and Williams, and circulated to the entire court, the court disagreed, finding that unless any of the judges had said at sentencing pre-*Booker* that he would have given the same sentence even if the guidelines were advisory, "it is impossible for a reviewing court to determine – without consulting the sentencing judge – . . . whether the judge would have done that." *Id.* The court directed a limited remand for all defendants except one who had challenged a judicial determination of facts which established his recidivist status. *Id.* at *6.[6]

The government also argued that if the judge imposed a sentence higher than the guideline minimum, it is clear the judge would not have imposed a lighter sentence even if he had known the guidelines were advisory. *Id.* at *9. The court disagreed, stating a conscientious judge would pick a sentence relative to the guideline range regardless of his private views, and if he thought the defendant was a more serious offender than an offender at the bottom of the range, he would give him a higher sentence even if he thought the entire range was too high. *Id.*

The court found that if the sentencing judge might have decided to impose a lighter sentence than dictated by the guidelines had he not thought he was bound by them, his error in having thought himself so bound may have precipitated a miscarriage of justice. *Id.* Additionally, the court stated that it would be an error to assume that every sentence imposed in violation of the Sixth Amendment is plainly erroneous and automatically entitles the defendant to be resentenced, the error the court asserted was committed by the Fourth Circuit in *Hughes I* and the Sixth Circuit in *Oliver*, discussed in Parts IV and VI, above. *Id.* at *10. In the court's view, what those courts overlooked is that if the judge would have imposed the same sentence even if he thought the guidelines were advisory and the sentence would have been lawful under the post-*Booker* scheme, there is no prejudice to the

[6] In *United States v. Brown*, 2005 U.S. App. LEXIS 1034 (7th Cir. Jan. 14, 2005), the defendant questioned whether he could argue that his sentence was unconstitutional in light of *Blakely* and *Booker*. *Id.* at *2. The defendant's offense level had been increased by the sentencing court due to his multiple previous convictions for crimes of violence or controlled substance offenses. Circuit Judges Easterbrook, Ripple, and Sykes found that he had not objected to the characterization of his prior convictions and that even after *Blakely*, the existence of prior convictions does not need to be proven beyond a reasonable doubt. *Id.*

defendant. *Id.* The court held that the only practical way to determine whether the kind of plain error argued in these consolidated sentences had actually occurred is to ask the sentencing judge, and in that way, it agreed in part with the Second Circuit in *Crosby*, discussed in Part II above, that when it is difficult for an appellate court to determine whether the error is prejudicial, it should, while retaining jurisdiction, order a limited remand to permit the sentencing court to determine whether it would reimpose the sentence. *Id.* If so, the court said it will affirm the original sentence against a plain-error challenge provided the sentence is reasonable. Lastly, the court determined that if the judge states on limited remand that he would have imposed a different sentence had he known the guidelines were advisory, it would vacate the original sentence and remand for resentencing. *Id.*

Further, the court disagreed with the Eleventh Circuit in *United States v. Rodriguez*, discussed in Part XI below, in which the Eleventh Circuit concluded that when it is impossible for a reviewing court to know what sentence the court would have given had it known the guidelines were advisory, because the defendant in such a case cannot show his substantial rights were affected, he therefore cannot establish plain error. *Id.* at *11. In the court's view, "given the alternative of simply asking the district judge to tell us whether he would have given a different sentence, and thus dispelling the epistemic fog, we cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence." *Id.*

Circuit Judge Ripple dissented, stating that the approach formulated by the panel, which requires a sentencing court to make "an abbreviated quick look," is hardly a substitute for the sentencing process the Supreme Court has said is mandated by the Constitution. *Id.* at *12. "Until the court undertakes a new sentencing process – cognizant of the freedom to impose any sentence it deems appropriate as long as the applicable guidelines ranges and the 18 U.S.C. § 3553(a) factors are considered – the district court cannot accurately assess whether and how its discretion ought to be exercised." *Id.* In Judge Ripple's opinion, the panel's holding requires the court to pre-judge and pre-evaluate evidence it has not heard, and the constitutional right at stake "hardly is vindicated by a looks-all-right-to-me assessment by a busy district court." *Id.*

Additionally, Circuit Judge Kanne dissented, expressing concern for the proposed mechanism to remedy the unconstitutionally imposed sentences. In his view, all sentences must be vacated and remanded to the sentencing courts for resentencing in light of *Booker*. *Id.* at *14. Judge Kanne pointed out that in *Booker*, although Fanfan's sentence did not violate the Sixth Amendment, it was nonetheless deemed unconstitutional because it was imposed under a mandatory guideline regime. Therefore, Judge Kanne stated "*any* sentence handed down under a mandatory guideline regime is unconstitutional," agreeing with the Fourth Circuit in *Hughes I*, the Sixth Circuit in *Milan*, and the Ninth Circuit in *Ameline*, discussed in Parts IV, VI, and IX, respectively. *Id.* at 14-15. (emphasis in original).

United States v. Lee, 2004 WL 3205270 (7th Cir. Feb. 25, 2005)

In *Lee*, because the sentence was at the statutory maximum and the guideline range was higher than that maximum, the defendant did not contend that his sentence was improper under

Booker, and instead contended that the sentencing court violated the Sixth Amendment because it made judicial findings that established the range. *Id.* at *1. In an opinion written by Circuit Judge Easterbrook, he and Judges Wood and Sykes found that under *Paladino*, a remand is necessary only when uncertainty otherwise would leave the court unsure about what the sentencing court would have done with additional discretion. *Id.* at *2. However, in the instant case, the sentencing court had expressed a strong preference to give a higher sentence if he had been able to do so, but stated that it was bound by the statutory maximum. Therefore, the court was assured that none of the defendant's substantial rights were adversely affected by the application of pre-*Booker* law, and affirmed the sentence. *Id.* at *3.

VIII. Eighth Circuit

A. Plain Error Standard

United States v. Easter, 2005 WL 566606 (8th Cir. March 11, 2005)

The defendant argued that the sentencing court plainly erred by making factual findings that increased his punishment under §§3A1.2 for official victim and 4B1.1 for being a career offender. *Id.* at *1. In a per curiam decision, and without substantive discussion, Circuit Judges Wollman, Murphy, and Benton found, assuming arguendo that it should review for plain error under *Booker*, any error in the §3A1.2 finding did not affect the defendant's substantial rights. Even without that enhancement, the same total offense level and criminal history category would have resulted in the defendant's classification as a career offender based on his two prior felony convictions for crimes of violence. *Id.* Additionally, the court stated that *Booker* reaffirmed that a fact of a prior conviction does not need to be established by a guilty plea or a jury verdict. *Id.* Therefore, the court affirmed the sentence.

B. Standard of Review in Cases Not Involving a Sixth Amendment Violation

United States v. Sayre, 2005 WL 544819 (8th Cir. March 9, 2005)

In *Sayre*, writing for Circuit Judges Bye and Gruender, Circuit Judge Beam stated that because the defendant admitted all facts used by the district court in imposing the sentence, there was no Sixth Amendment violation. *Id.* at *1. The sentencing court had imposed a 48-month sentence where the defendant, a former state judge, pleaded guilty to extortion after accepting a bribe, and a second charge of conspiring to obstruct justice by killing a witness was dismissed. *Id.* The sentencing court imposed a 2-level enhancement for obstruction of justice which the defendant agreed to, and an additional 4-level departure for the seriousness of the obstructive conduct, over the defendant's challenge. *Id.* The court discussed the proper appellate standard of review in cases where there is no Sixth Amendment violation; whether there must be an objection to the mandatory nature of the guidelines in order to preserve that error on appeal, or whether a general objection to the imposed sentence is sufficient to preserve a *Booker* error. *Id.* The court found that in this case, although the sentencing court followed a mandatory sentencing scheme, it did not affect the

defendant's ultimate sentence. *Id.* at *2. "Clearly, the district court wanted to fully account for [the defendant's] behavior and have that conduct reflected in [his] ultimate sentence," where the sentencing judge stated "'I am going somewhat over the Government's recommendation . . . In a goal I set for myself I won't use a five-year sentence, but I will use a four-year sentence. . . . I am satisfied that the seriousness of the offense requires that at least a four-year sentence be imposed." *Id.* Because there was no question that the sentencing court clearly imposed the sentence it believed appropriate on the facts, the court affirmed the sentence, finding it reasonably reflected the seriousness of the conduct. *Id.*

C. Drug Quantity Calculation

United States v. Coffey, 395 F.3d 856 (8th Cir. Jan. 21, 2005)

In *Coffey*, the jury checked the box on the verdict form indicating that the amount of crack attributable to the defendant was 50 or more grams. The sentencing court, however, went with the PSR which suggested holding the defendant responsible for 2.7 kilograms of crack. *Id.* at 859. Circuit Judges Wollman, Heaney and Fagg found that because *Booker* held that the mandatory guideline scheme was unconstitutional and made the guidelines effectively advisory, the case must be remanded for resentencing in accordance with *Booker*. *Id.* at 861. In a footnote, the court stated that it expressed no opinion whether a sentence handed down under the mandatory guideline system is plainly erroneous, nor did it consider the "outer limits of precisely what will preserve that issue." *Id.* at 861, n. 5.

***United States v. Fox*,** 396 F.3d 1018 (8th Cir. Jan. 31, 2005)

In *Fox*, Circuit Judges Loken and Smith and District Judge Dorr remanded the case for further consideration in light of *Blakely*. *Id.* at 1020. The jury had made a specific finding that the defendant was responsible for at least 50 but less than 500 grams of methamphetamine, but based on a preponderance of the evidence, the sentencing court found him responsible for 1.8 kilograms. *Id.* at 1022. Because the defendant had preserved this sentencing issue, the court held that pursuant to *Booker*, he was entitled to a new sentencing proceeding. *Id.* at 1027.[7]

United States v. Selwyn, 398 F.3d 1064 (8th Cir. Feb. 23, 2005)

In a drug conviction for possession with intent to distribute, the jury made no finding regarding the amount of methamphetamine involved, nor was an amount indicated in the indictment. *Id.* at 5. The sentencing court determined at sentencing that the defendant was responsible for an amount increasing his sentencing range from 10 to 16 months to 21 to 27 months. The defendant

[7] The Eighth Circuit has since remanded for resentencing in other post-*Booker* cases in which the defendant had raised the issue at sentencing, thereby preserving the issue for *Booker* purposes. *United States v. Fellers*, 2005 WL 350959 (8th Cir. Feb. 15, 2005); *United States v. Morin*, 2005 WL 450106 (8th Cir. Feb. 28, 2005); *United States v. Sdoulam*, 2005 WL 474337 (8th Cir. March 2, 2005).

objected to the quantity, thus preserving the issue for appeal. *Id.* at 6. In his appeal, the defendant contended his sentence was imposed in violation of the Sixth Amendment. *Id.* Quoting from *Booker* that facts necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to the jury beyond a reasonable doubt, Circuit Judges Heaney, Wollman and Fagg remanded for resentencing. *Id.*

D. Criminal History Calculation

1. §4A1.3 Inadequacy of Criminal History Category

United States v. Yahnke, 395 F.3d 823 (8th Cir. Feb. 1, 2005)

In *Yanhke*, the sentencing court departed upward two criminal history categories pursuant to §4A1.3 because of the defendant's prior second-degree murder conviction and his prior parole violations. *Id.* at 825. Circuit Judges Smith, Beam, and Benton stated that after *Booker*, circuit courts are to review sentences for unreasonableness, based on the factors in section 3553(a), and that even though the district court had labeled its reasons for departing in terms of the guidelines, the sentence was based on a consideration of the factors in that statute. *Id.* The court found that the sentencing court's interpretation of §4A1.3 was reasonable because neither the guidelines nor the commentary prohibit considering convictions also used to award criminal history points. *Id.* Therefore, because treating similar defendants with similar criminal histories is based on factors in section 3553(a), some categories of crime, such as murder, would be "under-represented by an inflexible 3-point addition for any sentence over one year and one month" as stated in §4A1.1(a). *Id.* Based on the record, the court found that the sentencing court's sentence was reasonable and was not an abuse of discretion. *Id.* at 826.

United States v. Cramer, 396 F.3d 960 (8th Cir. Feb. 3, 2005)

Circuit Judge Smith reviewed an upward enhancement imposed pursuant to §4A1.3 for unreasonableness in *Cramer*, and judged it with respect to the factors in section 3553(a), citing *Booker*. *Id.* at 965. The court found when a defendant fails to make an objection to specific factual allegations contained in the PSR, a sentencing court may accept those facts as true for purposes of sentencing. *Id.* at 965 (*citing United States v. Bougie*, 279 F.3d 648, 650 (8th Cir. 2002)). Because the defendant in this case did not contest facts listed in the PSR, the court found that the facts supported the sentencing court's finding that the defendant's prior criminal record under-represented his criminal history and likelihood to recidivate, and concluded there was sufficient evidence to support an upward departure under §4A1.3. Thus, the sentence was reasonable. *Id.* at 966.

2. Section 924(e) Armed Career Criminal Act

United States v. Nolan, 397 F.3d 665 (8th Cir. Feb. 11, 2005)

Circuit Judges Bye, Bowman, and Melloy stated in a footnote in *Nolan* that because the sentence was determined based not on an application of the guidelines, but on the mandatory minimum sentence set forth in the ACCA, the defendant was not entitled to resentencing. *Id.* at 5, n.2. The court further found that the sentencing court's classification of the defendant's prior convictions as violent felonies for purposes of imposing a sentence under the Act did not violate *Booker* because the Supreme Court has consistently said that the fact of a prior conviction is for the court to determine, not a jury. *Id.*

3. Statutory Minimum Based on Prior Conviction

United States v. Vieth, 397 F.3d 615 (8th Cir. Feb. 8, 2005)

The defendant in *Vieth* argued that he should be resentenced pursuant to *Booker* because he received a sentencing enhancement for his conviction under 18 U.S.C. § 841(b)(1)(B) due to a prior drug felony conviction. *Id.* at 618. Circuit Judges Melloy, Murphy, and Lay determined the jury had found beyond a reasonable doubt a quantity of methamphetamine in excess of 50 grams which resulted in a mandatory minimum sentence of five years, but because the defendant had a prior drug felony conviction, the sentencing court imposed the statutory minimum sentence of ten years. *Id.* The court found that because the sentence was not determined based on an application of the guidelines, and because the Supreme Court has determined in *Blakely* and *Booker* that the fact of a prior conviction is a fact for the court to determine, there was no *Blakely/Booker* issue in the case. *Id.*

E. Revocation of Supervised Release

United States v. Edwards, 2005 WL 517019 (8th Cir. March 7, 2005)

In *Edwards*, the defendant brought an appeal following his revocation of supervised release. In a per curiam decision, Circuit Judges Smith, Heaney and Colloton stated that although *Booker* significantly changed the federal sentencing scheme, "its effect on sentences imposed for supervised release violations is far less dramatic," because the federal guidelines associated with supervised release violations were considered advisory even prior to *Booker*. *Id.* at *1. Therefore, the court found no error in the sentencing court's consultation of the guidelines in determining the defendant's sentence, and stated its review of the guidelines applied by the sentencing court, given the defendant's criminal history and the nature of his violation, determined that he received the lowest sentence suggested. Thus, the court did not find such a sentence unreasonable. *Id.*

United States v. Cotton, 2005 WL 525226 (8th Cir. March 8, 2005)

The defendant in *Cotton* contended that the sentence imposed upon her revocation for supervised release was unreasonable. *Id.* at *1. The recommended sentence for her violation was 7 to 13 months' imprisonment but the PSR recommended a sentence of 46 months. Writing on behalf of Circuit Judges Riley and Gruender, Circuit Judge Gibson affirmed the sentence, stating that although *Booker* prescribed a new standard of review for guidelines cases generally, the new standard of review did not change the result in this case concerning a revocation of supervised release, because the standard is the same one the court would have used otherwise. *Id.* at *3.

IX. Ninth Circuit

A. Plain Error Standard

United States v. Ameline, 2005 U.S. App. LEXIS 2032 (9th Cir. Feb. 10, 2005)[8]

Circuit Judges Wardlaw, Gould, and Peaz granted the defendant's petition for rehearing to reconsider the court's post-*Blakely* holding in *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004), in which it held that the defendant's sentence under the guidelines violated the Sixth Amendment, and directed that a jury determine both the amount of drugs attributable to him and whether he possessed a weapon. *Id.* at *1. The court found that although its original *Ameline* opinion was consistent with *Booker*'s holding that the Sixth Amendment applies to the guidelines, it was at odds with *Booker*'s severability remedy that eliminated the mandatory nature of the guidelines. *Id.* at *3. In the present case, in applying a plain error review, the court concluded the defendant's sentence of 150 months violated the Sixth Amendment and was an error which seriously affected the fairness of his proceedings, and thus vacated and remanded for resentencing. *Id.* at *20. The court found that the sentence exceeded the maximum authorized by the facts established by the plea or a jury verdict because the defendant admitted to only a detectable amount of methamphetamine, and therefore faced a potential sentence of zero to 20 years under the statute, and that the maximum sentence the court could have imposed under the guidelines based on that admission was 16 months. *Id.* at *14. In providing guidance to the sentencing court, the Ninth Circuit stated *Booker* did not relieve the district court from its obligation to determine the guideline range, and in making that determination, the court must comply with Rule 32 and the basic procedural rules adopted to ensure fairness and integrity in the sentencing process. *Id.* at *4. Although the court originally directed that no petition for rehearing would be entertained and that

[8] On March 11, 2005, the Ninth Circuit granted a rehearing *en banc* in *United States v. Ameline*, directing that this panel decision of February 10, 2005, not be cited as precedent. *United States v. Ameline*, 2005 WL 612710 (9th Cir. March 11, 2005).

the mandate would issue forthwith, the following day, on February 10, 2005, the court recalled the mandate and directed the parties to file any petition for rehearing and/or rehearing *en banc*.[9]

B. Drug Quantity Calculation

United States v. Romero, 2005 U.S. App. LEXIS 940 (9th Cir. Jan. 19, 2005)

In *Romero*, the defendant appealed an alleged constructive amendment to the indictment by the district court, in violation of the Fifth Amendment. Although the indictment indicated the defendant and codefendants had aided and abetted in the possession of over 100 grams of heroin, the jury instructions stated that the defendants could be convicted if the amount of heroin was more or less than 100 grams. *Id.* at *5. Circuit Judges Browning, Reinhardt, and Thomas found the jury instructions constituted plain error and affected this defendant's substantial rights. Although the court affirmed the conviction because the defendant's claim failed one prong of the *de novo* standard of review in that there was overwhelming evidence of the defendant's involvement, the court remanded for resentencing pursuant to *Booker*. *Id.* at *10-11.

C. Downward Departure

United States v. Ruiz-Alonso, 397 F.3d 815 (9th Cir. Feb. 11, 2005)

In *Ruiz-Alonso*, the government appealed the sentencing court's decision to depart downward 4 levels in an illegal reentry case due, in part, to the defendant's cultural assimilation. *Id.* at 820. Circuit Judge Graber stated "we cannot say that the district judge would have imposed the same sentence in the absence of mandatory Guidelines and de novo review of departures." The court vacated the sentence and remanded for resentencing in a manner consistent with *Booker*. *Id.*

X. Tenth Circuit

A. Plain Error Standard

United States v. Labastida-Segura, 396 F.3d 1140 (10th Cir. Feb. 4, 2005)

In *Labastida-Segura*, Circuit Judges Kelly, O'Brien, and Tymkovich found that the parties stipulated in the plea agreement to the offense conduct in a violation for unlawful re-entry by a previously deported alien. *Id.* at 1142. However, because the sentencing court did not apply the guidelines in an advisory fashion, the court held that the remedial holding in *Booker* must be applied even though the defendant's sentence did not involve a Sixth Amendment violation. *Id.* The court

[9] The Ninth Circuit has remanded numerous sentences in light of *Booker* and *United States v. Ameline*, without further explanation. *United States v. Standley*, 2005 WL 319110 (9th Cir. Feb. 9, 2005); *United States v. Anaya*, 2005 WL 327637 (9th Cir. Feb. 11, 2005); *United States v. Perez*, 2005 WL 466053 (9th Cir. Feb. 15, 2005); *United States v. Sumner*, 2005 WL 428832 (9th Cir. Feb. 24, 2005); *United States v. Luna*, 2005 WL 518721 (9th Cir. March 7, 2005).

noted that had the guidelines been applied in an advisory fashion, its review would be limited to whether the sentence was unreasonable considering the factors in section 3553(a). *Id.* Citing *Williams v. United States*, 503 U.S. 193, 203 (1992), the court stated the Supreme Court has held that once an appellate court has decided the sentencing court misapplied the guidelines, a remand is appropriate unless the appellate court concludes that the error was harmless. *Id.* at 1143. Because the sentencing court plainly sentenced the defendant under a mandatory guideline scheme, and although the Supreme Court indicated that not every guideline sentence contains a Sixth Amendment error and not every appeal requires resentencing, the court found that it could not conclude the error in this case was harmless. *Id.* In the instant case, where the guideline sentence was already at the bottom of the range, the court reasoned, to say the sentencing court would have imposed the same sentence given the new legal landscape, "places us in a zone of speculation and conjecture - we simply do not know what the district court would have done after hearing from the parties. Though an appellate court may judge whether a district court exercised its discretion (and whether it abused that discretion), it cannot exercise the district court's discretion." *Id.* Therefore, the court remanded the case to the sentencing court.[10]

B. Drug Quantity Calculation

United States v. Lynch, 397 F.3d 1270 (10th Cir. Feb. 11, 2005)

The government appealed the sentenced imposed in *Lynch* because the sentencing court applied the offense level for the quantity of drugs admitted by the defendant in his plea agreement instead of the quantity of drugs contained in the PSR as attributable to the defendant. *Id.* at 1271. Circuit Judges Kelly, O'Brien and Tymkovich determined the court must remand for further proceedings because in *United States v. Fanfan*, the Supreme Court remanded for resentencing even though Fanfan's sentence involved no Sixth Amendment violation. *Id.* at 1272. The court found that in *Fanfan*, the Supreme Court stated "'the Government (and the defendant should he so choose) may seek resentencing under the system set forth in today's opinions. Hence we vacate the judgment of the District Court and remand the case . . .'" *Id.* The Tenth Circuit stated that in imposing this remedy, the Supreme Court specifically rejected the defense suggestions that "the Sixth Amendment holding be engrafted on the Sentencing Guidelines." *Id.* (*quoting Booker*, 125 S. Ct. at 768-69)).

[10] In *United States v. Arroyo-Berzoza*, 2005 WL 408062 (10th Cir. Feb. 22, 2005), Circuit Judge Anderson remanded for resentencing citing *Labastida-Segura*, even though the defendant admitted the conduct charged in the indictment and it was clear no Sixth Amendment violation occurred. *Id.* at *1. The court determined it must apply the remedial holding of *Booker* to the defendant's direct appeal because the sentencing court's error of sentencing the defendant under a mandatory scheme was not harmless. *Id.*

C. Restitution

United States v. Garcia-Castillo, 2005 U.S. App. LEXIS 2254 (10th Cir. Feb. 11, 2005)

In *Garcia-Castillo*, Circuit Judges Kelly, Anderson, and Lucero found that a restitution order did not violate *Blakely* even though a jury did not make the factual findings underlying the order. First, the court found that restitution ordered under the VWPA and the MVRA is not a criminal punishment. *Id.* at *14. Additionally, the court stated assuming arguendo that restitution was criminal punishment subject to *Blakely/Booker*, the Sixth Amendment was not implicated in the present case because by entering into the plea agreement, the defendant admitted the facts underlying the order and is unconditionally bound by its terms and what it encompasses. *Id.* at *16. Alternatively, the court found that even if restitution was criminal punishment, it would apply a plain error standard and any error would not have been plain. *Id.* at *19. Specifically, the court determined for an error to be plain, it must be "clear and obvious" and because there is a lack of uniformity in the law of the Tenth Circuit and in other circuits regarding whether restitution is criminal punishment, it is far from "clear and obvious" that restitution implicates the Sixth Amendment. *Id.* at *21.

XI. Eleventh Circuit

A. Plain Error Standard

United States v. Rodriguez, 398 F.3d 1291 (11th Cir. Feb. 4, 2005)

In *Rodriguez*, Circuit Judge Carnes, writing for Judges Marcus and Fay, held that the defendant did not meet the third prong of the plain error test in that the sentence imposed did not violate his substantial rights, reaching a different conclusion on this issue than had the Second Circuit in *Crosby*, the Fourth Circuit in *Hughes I*, and the Sixth Circuit in *Oliver*. *Id.* at 1301. As the court opined, the Supreme Court has instructed appellate courts that plain error review should be used sparingly, and the burden was on the defendant to show that the error actually did make a difference, stating, "if it is equally plausible that the error worked in favor of the defense, the defendant loses; if the effect of the error is uncertain so that we do not know which, if either, side it helped the defendant loses." *Id.* at 1300 (*citing Jones v. Unites States*, 527 U.S. 373, 394-95 (1999)). The third prong requires that an error have affected substantial rights, which requires that the error "'must have affected the outcome of the district court proceedings.'" *Id.* at 1299 *(quoting United States v. Cotton*, 535 U.S. 625, 631-32 (2002)). According to the court, the standard for showing that the third prong has been met is to "show the reasonable probability of a different result," meaning a probability "sufficient to undermine confidence in the outcome." *Id.* (*quoting United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004)).

In the instant case, the court found that the error committed before *Booker* was not that there were "extra-verdict enhancements – enhancements based on facts found by a judge that were not admitted by the defendant or established by the jury verdict – that led to an increase in the

defendant's sentence. The error [was] that there were extra-verdict enhancements *used in a mandatory guidelines system*." *Id.* at 1300 (emphasis added). The court additionally found that if the same extra-verdict enhancements had been found and used in the same way in an advisory system, the result would have been constitutionally permissible under *Booker*, for two reasons. *Id.* First, according to the court, Justice Steven's majority opinion in *Booker* explicitly stated "[i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Id.* (*quoting Booker*, at 750). Second, the *Booker* opinion authored by Justice Breyer specifically provides for extra-verdict enhancements in all future sentencings by holding that the guideline system was constitutional once two parts of the SRA were severed, and no other part of the SRA or the guidelines regarding extra-verdict enhancements was so severed. *Id.* In applying the third prong, the court determined the question to ask is whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of a binding fashion by the sentencing judge. *Id.* at 1301. The court found it obvious that it did not know if a different sentence would have resulted, and therefore it was controlled by the *Jones* decision, which directed that where the effect of an error on the result in the sentencing court is uncertain or indeterminate, the appellant did not meet his burden of showing prejudice and therefore had not met his burden of showing that his substantial rights were affected. *Id.* Therefore, the court affirmed the sentence.

United States v. Curtis, 2005 U.S. App. LEXIS 3436 (11th Cir. Feb. 28, 2005)

The defendant's appeal in *Curtis* was first heard after *Blakely,* wherein in a footnote, the court conducted a plain error analysis and concluded that the defendant had failed to satisfy the second prong because the error was not obvious, and had also failed to satisfy the fourth prong. *Id.* at *1. In this appeal, in a per curiam decision, the court granted rehearing for the sole purpose of withdrawing that footnote as it appeared, and substituted a new footnote instead. *Id.* at *2. The new footnote states that the plain error analysis in the instant case is controlled by *Rodriguez*, and as in that case, the defendant satisfied the first two prongs of the analysis. *Id.* at *3. However, the footnote further states that as in *Rodriguez*, the defendant cannot satisfy the third prong because to do so he must show that the error affected his substantial rights, which "almost always requires that the error must have affected the outcome of the proceedings below." *Id.* at *4. Moreover, the court stated that the defendant bears the burden of persuasion with respect to establishing prejudice. In applying the *Rodriguez* analysis, the court concluded that the defendant cannot satisfy the third prong because nothing in the record suggests there was a reasonable probability of a different result if the sentencing judge had applied the guidelines in an advisory fashion. *Id.* The sentencing court sentenced the defendant to the maximum term of imprisonment permitted by the applicable guidelines, which is inconsistent with a suggestion that he might have imposed a lesser sentence if he had realized the guidelines were advisory. Thereafter, the court reaffirmed the text of its original opinion. *Id.* at *5.

United States v. Shelton, 2005 U.S. App. LEXIS 3290 (11th Cir. Feb. 25, 2005)

In *Shelton*, Circuit Judge Hull, writing for Circuit Judge Marcus, determined that there was no Sixth Amendment violation where the sentencing court found the quantity amount used to determine the sentence, and the defendant filed no objection to the PSR that established the offense conduct and the relevant conduct and drug quantities. *Id.* at *5. However, at sentencing, the court expressed dissatisfaction with the sentence it imposed, commenting that the sentence was "very, very severe" due to the criminal history points and the mandatory consecutive five-year sentence on a section 924(c) firearm count, stating that Congress has taken a "very, very hard stance when it comes to guns and drugs," and indicating that the guidelines and relevant conduct dictated the result. *Id.* at *7.

In a review for plain error, the court first rejected the defendant's argument that the sentencing court erred when it enhanced his sentence based solely on judicial fact-finding of drug quantity and his prior convictions, and held that *Booker* reaffirmed the Court's holding in *Apprendi* that any fact other than a prior conviction must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* at *9-10. The court further found that the first prong was not satisfied because the defendant admitted to the drug quantity by raising no objections to the PSR and not disputing any factual matters. *Id.* at *11. However, the court found error in the sentence imposed, because the sentencing court sentenced the defendant under a mandatory guideline scheme even in the absence of a Sixth Amendment violation. The court held the defendant carried his burden of satisfying the third prong that there was a reasonable probability of a different result if the guidelines had been applied as advisory, because the sentencing court expressed several times its view that the sentence required by the guidelines was too severe and sentenced the defendant to the lowest possible sentence it could. *Id.* at *20. Therefore, the fourth prong was also satisfied because the sentence seriously affected the fairness and integrity of judicial proceedings, and exercise of the court's discretion was warranted. *Id.* at 16. The court vacated the defendant's sentence and remanded for resentencing. *Id.* at *22.

B. Drug Quantity Calculation

United States v. Grinard-Henry, 2005 U.S. App. LEXIS 2251 (11th Cir. Feb. 11, 2005)

The defendant in *Grinard-Henry* appealed his sentence, challenging the sentencing court's drug quantity determination on *Blakely* grounds, claiming the amount was greater than the amount to which he pleaded guilty. The government moved to dismiss his appeal based on a waiver in his plea agreement. *Id.* at *1. Circuit Judges Marcus, Hull and Carnes determined one exception in his plea agreement allowed him to appeal a sentence "above the statutory maximum," and the court determined that it had recently held in *United States v. Rubbo*, that the term "statutory maximum" in a plea agreement permitting appeal in the limited circumstances of a sentence exceeding the statutory maximum refers to "the longest sentence that the statute which punishes a crime permits a court to impose, regardless of whether the actual sentence must be shortened in a particular case because of the principles involved in the *Apprendi/Booker* line of decisions." *Id.* at *5. In this case,

the court found the defendant's sentence did not exceed the relevant statutory maximum and he was therefore not entitled to appeal his sentence under this exception. *Id.* at *5-6. Another exception in his plea agreement was one allowing the defendant to appeal a sentence in violation of the law, apart from sentencing guidelines. The defendant asserted the sentencing court sentenced him based on a drug quantity greater than the quantity to which he pleaded guilty and thus his sentence violated the Fifth and Sixth Amendments. *Id.* at *6. However, the court found his appeal, in effect, asserted that the guidelines were not constitutionally applied and thus his challenge involved the application of the guidelines, not a violation of law apart from the guidelines. *Id.*

C. *Ex Post Facto* Laws

United States v. Duncan, 2005 U.S. App. LEXIS 3269 (11th Cir. Feb. 24, 2005)

In *Duncan*, the defendant was convicted by a jury of a conspiracy involving five or more kilograms of cocaine. In applying the court's reasoning in *Rodriguez*, Circuit Judges Anderson, Birch and District Judge Land, sitting by designation, found that the defendant did not satisfy the third prong of plain error analysis because he could not show an error that affected his substantial rights. *Id.* at *1. The court emphasized that Justice Breyer's opinion in *Booker* left as the only maximum sentence the one set out in the statute and the only error by the sentencing court was that the judge perceived the guidelines to be mandatory when they are now deemed to be advisory. *Id.* at *16. However, the defendant could not show that the error affected his substantial rights because he acknowledged that "[i]t is simply impossible to determine whether the district court would have imposed the same sentence under a discretionary Guideline scheme." *Id.* at *18. Because the defendant bears the burden of persuasion with respect to prejudice, he was not able to meet the burden. *Id.*

The defendant additionally argued that Justice Steven's *Booker* opinion should be applied retroactively, but that applying Justice Breyer's *Booker* opinion retroactively would violate the Due Process Clause because of the Supreme Court's holding in *Bouie v. Columbia*, 378 U.S. 347 (1964), where the Court held that judicial enlargement of a criminal statute, applied retroactively, violated the Due Process Clause because it was unforeseeable and therefore like an *ex post facto* law. *Id.* at *26. He argued that the remedial opinion authored by Justice Breyer, if applied retroactively, would increase the sentence authorized by the jury's verdict to a maximum of life, and therefore would operate as an *ex post facto* law in violation of his due process rights. *Id.* at *28. However, the court found that at the time he committed the offense, the statute subjected the defendant to a sentence of life imprisonment if he was convicted of possessing at least 5 kilograms of cocaine powder. The guidelines at the time also subjected the defendant to up to life imprisonment. Therefore, the court found the defendant had ample warning at the time he committed the offense that life imprisonment was a potential consequence of his actions. *Id.*

XII. District of Columbia Circuit

Plain Error Standard

United States v. Coumaris, 2005 WL 525213 (D.C. Cir. March 8, 2005)

Blakely was decided after the parties in *Coumaris* filed their appellate briefs, and the court deferred resolution of this appeal until *Booker* was decided. After *Booker*, the government moved to vacate the defendant's sentence and remand for resentencing, conceding that the mandatory enhancements to his sentence were unconstitutional. *Id.* at *3, 6. Although the defendant challenged the alleged improper application of enhancements to his base offense level, the court did not reach those challenges because it granted the government's Motion to Remand pursuant to *Booker*. *Id.* at *6. The government also agreed with the defendant that, by noting his objection to the PSR that *Apprendi* had rendered the guidelines problematic, he had "made a sufficient objection in the district court to preserve a Sixth Amendment challenge to his sentence." *Id.* at *6. The court therefore found that the *Booker* challenge in this case was governed by the harmless error standard of review appropriate for constitutional error, and noted that the government stated it could not satisfy that standard, conceding that it could not demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained." *Id.*

Although the defendant urged the court to resolve his specific challenges to the application of the guidelines, the court declined to do so, determining that because the sentencing court might impose a different sentence on remand and because the parties might decide to not appeal that sentence, in its view, any consideration of the defendant's objections would be "premature at best and unnecessary at worst." *Id.* at *7.

REPRESENTATIVE DISTRICT COURT OPINIONS

I. Advisory Guidelines Are to Be Given Great Weight

This memo explores the opinions of five judges in four districts in the Eighth and Tenth Circuits who have ruled that the post-*Booker* advisory guidelines are to be given great weight. Judge Cassell in the District of Utah was first, followed by Judge Holmes in the Northern District of Oklahoma, both in the Tenth Circuit, and by Judges Battalion and Kopf, both in the District of Nebraska, and Judge Hovland in the District of North Dakota, in the Eighth Circuit.

A. Eighth Circuit

1. District of Nebraska

United States v. Huerta-Rodriguez, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005)

In *Huerta-Rodriguez*, Judge Battalion emphasized that although the court is not bound by the guidelines, it must "consult" and "take them into account when sentencing." *Id.* at *3. It found that the Supreme Court in *Booker* had neither held nor implied that the measure of reasonableness is the guideline range, and instead stated it was mindful that "'any system which [holds] it is *per se* unreasonable (and hence reversible) for a sentencing judge to reject the guidelines is indistinguishable from the mandatory system.'" *Id.* at *4 (*quoting Booker*, at 794 (Scalia, J., dissenting)). Therefore, the court determined that its measure of reasonableness will be guided by the statutory factors set out in § 3553(a), together with consideration of the advisory guidelines. *Id.*

Significantly, the court quoted Justice Thomas' dissent in *Booker* to find that "the Due Process Clause is implicated whenever a judge determines a fact by a standard lower than beyond a reasonable doubt if that factual finding would increase the punishment above the lawful sentence that could have been imposed absent that fact." *Id.* at *6 (*citing* Thomas' dissent which stated the Court's holding in *Booker* corrects the Sentencing Commission's mistaken belief, set out in §6A1.3, that the preponderance of the evidence standard is appropriate to meet due process requirements; "[t]he Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by a jury or admitted by the defendant." *Booker*, at 798 n. 6)).[11] Thus, the court found that because a sentencing court's discretion is constrained by "reasonableness," the "upper limit of a lawful sentence is no longer the 'maximum term of imprisonment' under a statute that sets out a generally broad range (*i.e.*, the 'statutory maximum'), but the highest point within that range that is 'reasonable.'" *Id.* at *7. The court stated the fact that its discretion is curtailed by a requirement of reasonableness meant it could not sentence a defendant above a reasonable point within a sentencing range without affording the defendant the procedural protections of the Fifth and Sixth Amendments. *Id.* at *8. Thereafter, the court found that it could not adopt the government's position that a sentence should fall within the guidelines range absent highly unusual circumstances, because a wholesale application of the guidelines as *per se* reasonable would effectively convert the advisory guideline system to a mandatory scheme. Similarly, the court stated it would not preserve a "de facto" mandatory guideline scheme by affording the guidelines a presumption of reasonableness in every case. *Id.* at *9. On this point, it was the court's view that although some guidelines are based in part on statistical analyses of pre-guideline sentences, for policy reasons and because of applicable statutory minima, other guidelines are less reliable appraisals of fair sentences. *Id.* at *11. The court found "[w]hatever the constitutional limitations on the advisory statutory

[11] In a footnote, the court acknowledged this approach is similar to one it used after the *Blakely* opinion was issued, in *United States v. Terrell*, 2004 WL 1661018 (D. Neb. July 22, 2004), and stated although it is not mandated by *Booker*, it is also not inconsistent with nor prohibited by Booker. *Id.* at *9, n. 8.

sentencing scheme, . . . it can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt," and further held it would continue to require that facts that enhance a sentence are properly pled in an indictment and either admitted or submitted to the jury for determination by proof beyond a reasonable doubt. *Id.* at *20.

United States v. Wanning, 354 F. Supp.2d 1056, 2005 U.S. Dist. LEXIS 2477 (D. Neb. Feb. 3, 2005)

In *Wanning*, Judge Kopf adopted the view of Judge Cassell in *United States v. Wilson I*, and found that the guidelines provide the presumptively reasonable sentence even though they are advisory. *Id.* at *2. In the court's opinion, because the guidelines and their ranges were explicitly crafted by the Commission at the direction of Congress to implement the statutory purposes of sentencing, and because Congress kept the power to accept or reject both the initial guidelines and any amendments, "judges cannot reasonably conclude that Congress willfully or negligently allowed Guideline ranges to be implemented that contradicted the statutes [it] enacted for the purpose of setting sentencing goals." *Id.* at *11. Further, the court argued that if a sentencing court does not give the guidelines considerable weight or deference, there is nothing to harmonize and implement the varied statutory goals of sentencing, leading to a "mix-and-match" approach which would return sentencing practice to a pre-guideline system. *Id.* at *14. Such a practice, asserted the court, flies in the face of what Congress intended in adopting the guideline sentencing scheme. *Id.* Additionally, the court stated "under the advisory Guideline scheme, a judge should depart from the Guidelines when normal departure theory warrants. The judge should also deviate from the Guidelines when normal departure theory fails but another sentencing range from within the Guidelines more accurately (and honestly) describes the real offense behavior." *Id.* at *19. In the instant case, the court believed the 18-month sentence it imposed under the guidelines for access-device fraud was reasonable because it fell within the advisory guideline range, substantial weight was given to the guidelines, a downward departure under normal departure theory was not warranted, and there were no other sufficient reasons given to impose a different sentence. *Id.* at *23.

2. District of North Dakota

United States v. Peach, 2005 WL 352636 (D.N.D. Feb. 15, 2005)

In *Peach*, Judge Hovland followed Judge Kopf's opinion in *United States v. Wanning* when he determined that the guidelines should be given substantial weight and the guideline range established by the Commission provides a presumptively reasonable sentence. *Id.*

B. Tenth Circuit

1. District of Utah

United States v. Wilson I, 350 F. Supp.2d 910 (D. Utah Jan. 13, 2005)

The defendant in *Wilson I* was convicted of bank robbery and had an extensive criminal history. Upon reviewing the applicable congressional mandates in the SRA, and congressional history in the sentencing realm, Judge Cassell first concluded that considerable weight should be given to the guidelines, and that further, with respect to the congressionally mandated goal of achieving uniformity, the guidelines are the only way to create consistent sentencing because they are the only uniform standard available. *Id.* at 912. The court stated that for all future sentencings, it will give heavy weight to the guidelines in determining the appropriate sentence. *Id.* Because the court asserted that judicial discretion in sentencing is limited by clear congressional directives and mandates regarding the guidelines, in all but the most unusual sentences, the guideline sentence will be the appropriate sentence. *Id.* at 914. Additionally, the court found that the Commission was bound by the terms of the "parsimony provision" of section 3553(a) which requires courts to impose a sentence sufficient but not greater than necessary to comply with purposes set forth in the SRA when it promulgated the guidelines. *Id.* at 923. Therefore, the guidelines should be followed to avoid unwarranted sentencing disparity and should be given great weight to avoid disparities, pursuant to section 3553(a)(6). In the court's opinion, the only way to do this is to apply some uniform measure in all cases, and the only current standard is the guideline scheme. The court further stated it would only deviate from the guidelines in unusual cases, and only for clearly identified and persuasive reasons. *Id.* at 925.

United States v. Wilson II, 2005 U.S. Dist. LEXIS 1486 (D. Utah Feb. 2, 2005)

In *Wilson II*, Judge Cassell revisited the sentence he imposed in *Wilson I*, above, after the defendant filed a motion to reconsider, based on several district courts' opinions, but most noteably Judge Adelman's opinion in *United States v. Ranum*, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005) (discussed below) which followed a more flexible approach to sentencing.[12] The court found that Judge Adelman's approach was flawed for three reasons. *Id.* at *17. First, Judge Cassell stated that *Ranum* altered the guideline approach of giving limited effect to offender characteristics. In the court's reasoning, *Ranum*'s contention that the guidelines forbid consideration of offender characteristics is incorrect. The Commission has carefully calibrated the extent to which offender characteristics should determine a sentence, also taking into account those characteristics Congress has specifically forbidden. *Id.* Additionally, the court noted that there are certain factors the Commission has explained are "not ordinarily relevant" in the determination of whether to impose

[12] Other cases cited by the court which have rejected the reasoning in *Wilson I* include *United States v. Myers,* 2005 WL 165314 (S.D. Iowa Jan. 26, 2005); *United States v. West*, 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005); and *United States v. Huerta-Rodriguez*, No. 04-365, slip op. (D. Neb. Feb. 1, 2005). *Wilson II*, *2, at n. 5.

a sentence outside the applicable range, but that are still potentially available for a determination within the applicable range. *Id.* Second, the court disagreed with *Ranum* because Judge Adelman gave undue emphasis to the idea that an offender might become rehabilitated in prison. The court asserted that Congress, in enacting the SRA, specifically gave rehabilitation a secondary role in the determination of a sentence, and that the guidelines have already properly implemented that congressional will. *Id.* at *58. Finally, the court argued that *Ranum* did not pay enough attention to the statutory requirement to avoid unwarranted sentencing disparity. The court reiterated its argument in *Wilson I* that only close adherence to the guidelines offer any prospect of treating similarly-situation offenders similarly. *Id.*

The court stated that it remained convinced the guidelines should be given great weight in determining the appropriate sentence and should vary from the guidelines only in rare cases, as it had found in *Wilson I*. *Id.* at *3. Additionally, the court rejected *Ranum*'s contention that courts should no longer follow the departure methodology in sentencing because courts are free to disagree with the actual range proposed by the guidelines as long as the sentence is reasonable and supported by reasons in § 3553(a). *Id.* at *53 (*citing Ranum*, at *2). The court instead found that it is critical for courts to follow the departure methodology because *Booker* commands that courts must consult the guidelines and take them into account. In the court's opinion, sentencing courts can only follow *Booker*'s requirement if they calculate and consider the guideline advice. *Id.* at *49-50 (*citing United States v. Crosby*, at 24). Further, following this methodology is important for purposes of allowing the Commission and Congress to monitor how the new system is working, and the PROTECT Act specifically requires courts to state their reasons in writing for issuing a sentence outside the guideline range for this reason. *Id.* at *52. Finally, the court stated that following this methodology is important because it guides the exercise of discretion, and will therefore help to minimize unwarranted sentencing disparities. *Id.* at *53.

United States v. Duran, 2005 U.S. Dist. LEXIS 1287 (D. Utah Jan. 31, 2005) (revised Feb. 17, 2005)

Judge Cassell held in *Duran* that under *Booker*, the guidelines are advisory under the safety valve provision of § 3553(f), finding that the same constitutional defect in judicial fact-finding in a mandatory guideline scheme exists when a sentencing court uses the guidelines to determine a sentence under the safety valve. *Id.* at *2. The government argued that because Section 3553(f) states the court "shall impose a sentence pursuant to the guidelines . . . without regard to any statutory minimum sentence," the court was required to impose a sentence no lower than the guideline range determined after application of the safety valve. *Id.* at *3. The court held, however, that the advisory guidelines are not transformed into mandatory guidelines under the safety valve provision because the statute itself only directs the court to impose a sentence "pursuant to" the guidelines, and thus, so long as the court consults the guidelines in determining an appropriate sentence, any resulting sentence will be "pursuant" to the guidelines. *Id.* at *5. In the court's view, any other reading of the safety valve provision renders it unconstitutional under the Sixth Amendment as interpreted by *Booker*. *Id.* Continuing to give considerable weight to the guidelines as it had explained in *United States v. Wilson*, the court engaged in the guideline application,

awarding the defendant an acceptance of responsibility decrease and an additional 2-level decrease for the safety valve under §5C1.2, for a guideline range of 87 to 108 months. Although this sentence was below the ten year statutory mandatory minimum, the court found the safety valve provision permitted it to impose this lower sentence. The court then held judgment for an additional 14 days to allow the government to file any objection after consulting with the Criminal Division of the Department of Justice, stating it "would appreciate understanding how the Department intends to approach this issue in other cases." *Id.* at *13.

2. Northern District of Oklahoma

United States v. Barkley, 2005 U.S. Dist. LEXIS 2060 (N.D. Ok. Jan. 24, 2005)

According to Judge Holmes, courts may constitutionally apply the guidelines if the manner of their application fully protects the Sixth Amendment rights articulated in *Blakely*. *Id.* at *2. The courts should exercise their discretion by strictly applying the guidelines in all cases, modified to satisfy *Blakley*. Therefore, the court found that in the instant case, the guidelines should be applied consistent with *Blakely* and *Booker*, and as a result, sentencing the defendant under the guidelines will be constitutional. *Id.* The court relied heavily on its belief that Congress will reimpose a mandatory sentencing system, which under *Booker* must reflect modifications as necessary to accomplish the Sixth Amendment rights described in *Blakely*. *Id.* at *15. The court's belief centers on its finding that as a matter of history, policy, and common sense, the best sentencing system is one that is mandatory and fully accommodates the Sixth Amendment rights. Because Congress is going to seek a mandatory system as the most effective means of achieving uniformity, the court believes the best course of action is to apply the guidelines in sentencing, with the necessary changes to meet the *Blakely* requirements. *Id.* at *17. Additionally, the court found that a mandatory sentencing system is better and more effective in promoting uniformity, with the modifications needed to satisfy *Blakely* creating a better system for protecting defendants' rights. *Id.* at *19.

Further, the court stated that the burden of proof for sentencing factors should be one of beyond a reasonable doubt, either to the jury in a trial, or to the judge with a proper waiver and consent, and the rules of evidence should apply. To ensure that *Blakely* and *Booker* are followed, the court stated that the trial court must put before the jury each fact that must be established to support an enhancement. *Id.* at *40. Finally, the court acknowledged that there will be the rare case where evidence regarding sentencing factors might be prejudicial, including relevant conduct, and in that case, a second phase will be required for presentation to the jury. *Id.* at *43. Therefore, the government should charge the relevant conduct in the indictment wherever possible. *Id.*

II. Advisory Guidelines Not Followed; Sentence Imposed Below the Guideline Range

This memorandum explores the decisions of seven district judges in the First, Second, Fourth, Seventh, and Eighth Circuits who have not followed the advisory guidelines, beginning first with Judge Adelman in the Eastern District of Wisconsin and followed by Judge Simon in the Northern District of Indiana, both in the Seventh Circuit; Judge Hornby in the District of Maine and

Judge Gertner in the District of Massachusetts, both in the First Circuit; Judge Sweet in the Southern District of New York in the Second Circuit in an opinion at odds with his fellow judge in *United States v. Ochoa-Suarez*; Chief Judge Jones in the Western District of Virginia in the Fourth Circuit; and Judge Pratt in the Southern District of Iowa in the Eighth Circuit.

A. First Circuit

1. District of Maine

United States v. Revock, 353 F. Supp.2d 2005, U.S. Dist. LEXIS 1151 (D. Me. Jan. 28, 2005)

In *Revock*, one codefendant was sentenced after *Blakely* but prior to *Booker*, and the second co-defendant was to be sentenced after *Booker* was decided. The first defendant received no enhancement for the obliterated serial number because there had been no stipulation to the fact, but because of the sentencing delay for the defendant in *Revock* until after *Booker*, Judge Hornby found he was able to find that fact by a preponderance of the evidence and without a jury finding as long as he treated the guideline calculation as advisory. *Id*. at *2-3. The court asserted that according to *Booker*, he was to look to the sentencing factors in section 3553(a) to determine whether to apply the advisory guideline sentence, and that one factor to consider was "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* at *4. Because both defendants' conduct was not just similar but identical, the court concluded that the guideline sentence for the second defendant impeded the statutory goal of sentencing uniformity, and after considering all the other section 3553(a) factors and finding none which counseled a different outcome, sentenced him outside and below the applicable guideline range so he would receive the same sentence as the first defendant. *Id.* The court, however, specified that its decision, based upon the disparity factor of section 3553(a), represented a very narrow category of cases and applied to defendants with similar records who engaged in joint criminal behavior where one defendant was sentenced between *Blakely* and *Booker* without an appeal and benefitted from the district's post-*Blakely* approach, and the other defendant was sentenced after *Booker* without receiving the same benefit. *Id.* at *5.

United States v. Jones, 352 F. Supp.2d 22, 2005 WL 121730 (D. Me. Jan. 21, 2005)

In *Jones*, the defendant, the government, and the probation office all asked the sentencing judge to depart downward from Zone D to Zone C, pursuant to §§5H1.3, 5K2.13, 5K2.19, and 5K2.0. Judge Hornby found none of those departures appropriate in this case, and therefore concluded that a "guideline-type" sentence was not appropriate. *Id.* at *1-2. The court noted that under *Booker*, it would review the sentencing factors under 18 U.S.C. § 3553(a) in determining whether the advisory guidelines are to be followed, and decided to not follow them in this case. *Id.* at *3. The court therefore used the factors in section 3553 to find 1) a sentence under section 3553(a)(2)(D), which reflects the need to provide medical care or other correctional treatment, would accomplish that need better than a sentence under the guidelines; 2) the need to protect the public as stated in section 3553(a)(2)(c) would not be better accomplished by a few more months in prison

as would occur under the guidelines, and this need to protect the public was offset by the increased risk to the defendant's mental health which would have occurred with the longer term of imprisonment suggested under the guidelines due to the interruption of his treatment; and 3) that section 3553(a) looks to the nature and circumstances of the offense, and in this case, the defendant would not have possessed the guns as a mental patient had he known that he was prohibited from doing so. *Id.* The court found that the guidelines do not authorize a departure, but that sentencing the defendant in Zone C instead of Zone D would better accomplish the statutory goals of sentencing than the guideline sentence. *Id.*

2. District of Massachusetts

United States v. Jaber, No. 02-10201, slip op. (D. Mass. March 3, 2005)

In *Jaber*, Judge Gertner determined that *Booker* does not necessitate reconsideration of any sentences she imposed in light of her post-*Blakely* approach in *United States v. Mueffelman*. The court agreed with the Second Circuit opinion in *Crosby*, discussed above, that it is not useful to determine in advance the weight that judges should give to applicable guideline ranges. *Id.* at 10. The judge also expressed concern over Judge Cassell's approach in *Wilson I*, determining that the *Wilson* method "comes perilously close to the mandatory regime found to be unconstitutionally infirm in *Booker*." *Id.* at 11, 12. In her view, the *Wilson I* court's reliance on the Commission's studies, which helped the court find the guidelines in fact achieved the statutory purposes of sentencing, was misplaced. *Id.* at 13. Judge Gertner stated the Commission made no effort to implement the statutory purposes of sentencing and in effect, the purposes enumerated under section 3553(a) became irrelevant to the guidelines. *Id.* at 17. The court opined that the only way for courts to truly consider the guidelines is to "do in each case just what the Commission failed to do - to explain, correlate to the purposes of sentencing, cite to authoritative sources, and be subject to appellate review. As for the Commission, it can now return to what it was supposed to do as well – to studying the impact of sentences on crime control, as well as monitoring disparity." *Id.* at 22.

B. Second Circuit

1. Southern District of New York

United States v. West, 2005 U.S. Dist. LEXIS 1123 (S.D.N.Y. Jan. 27, 2005)

In *West*, Judge Sweet cited approvingly to Judge Adelman's opinion in *United States v. Ranum*, and stated that the guideline calculations are to be treated as "just one of a number of sentencing factors." *Id.* at *5 (*quoting Ranum*, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005)). Although the court acknowledged that other district courts imposing sentences after *Booker* have concluded that the guidelines should remain the dominant or even determinative factor in the sentencing analysis, the court found instead that under section 3553(a), the sentencing court is required to consider "a host of individual variables and characteristics excluded from those calculations called for by the Guidelines." *Id.* at *6 (*citing United States v. Barkley*, 2005 U.S. Dist.

LEXIS 2060 (N.D. Ok. Jan. 24, 2005); and *United States v. Wilson*, 2005 WL 78552 (D. Utah Jan. 13, 2005)). According to the court, the appropriate consideration of a number of factors in section 3553(a), including the defendant's history and characteristics, requires reliance upon facts not typically either admitted by the defendant or found by a jury. *Id.* at *7. Therefore, the court stated it would sentence the defendant based upon the facts admitted in connection with his plea and upon those facts found by the court in the context of its analysis under section 3553(a) as limited by both *Apprendi* and *Booker*. *Id.*

The sentence imposed fell at the bottom of the advisory guideline range and represented the statutory maximum term of imprisonment and supervised release for the underlying offense, and the court found that the terms imposed "befit the need for a sentence . . . to reflect the seriousness of the offense and to provide just punishment in light of an offense that affected scores of victims, some 200 of whom have submitted statements to the court describing the financial, familial and emotional toll that their dealings with [the defendant] has taken" and that by imposing a sentence within the guideline range, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" is presumptively satisfied. *Id.* at *20 (*citing* 18 U.S. C. § 3553(a)(6)).

C. Fourth Circuit

1. Western District of Virginia

United States v. Mullins, 2005 WL 372209 (W.D. Va. Feb. 16, 2005)

In *Mullins*, the defendant was convicted after pleading guilty to, in part, possessing a semiautomatic assault rifle and selling a firearm without the proper documentation. The defendant filed a Motion for Downward Departure on the basis that possession of a semiautomatic assault rifle is no longer a crime after September 13, 2004. *Id.* at *2. Chief Judge Jones stated the first step after *Booker* in determining a sentence is to determine the guideline range prescribed after making such findings of fact that are necessary and noted neither the defendant nor the government had objected to the PSR or to its application of the applicable guideline range. *Id.* (*quoting Hughes I*). The sentencing court found there had not yet been any authoritative formulation following *Booker* as to the weight to be given to the guidelines, comparing *United States v. Wilson I* and *United States v. Ranum*. *Id.* at *3. However, in the instant case, the judge found that evaluation of the sentencing goals justify a sentence below the guidelines. *Booker* requires a sentencing court to impose a sentence not greater than necessary to comply with certain listed sentencing purposes, including "affording adequate deterrence to criminal conduct." *Id.* In the present case, the court found neither the defendant nor others can be deterred by a sentence based on the guideline range for possession of a semiautomatic assault rifle because that conduct is no longer criminal. "Instead, the more apt guidelines range should be based on the conduct that is still criminal - selling a firearm without the proper documentation." *Id.* Taking into account the guidelines as well as the 3553(a) goals, the court found the reasonable sentence to be 40 months' imprisonment, giving "recognition to the range

while also applying an appropriate reduction because of the removal of criminality of the offense used to calculate that range." *Id.*

D. Seventh Circuit

1. Eastern District of Wisconsin

United States v. Ranum, 353 F. Supp.2d 984, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005)

In *Ranum*, Judge Adelman found that under *Booker*, courts must treat the guidelines as just one of a number of sentencing factors. According to the court, *Booker* makes clear that the courts may no longer uncritically apply the guidelines, and stated that Judge Cassell's opinion in *United States v. Wilson I* is inconsistent with the holdings of the merits-majority in *Booker,* which rejected mandatory guideline sentences based on judicial fact-finding, and with the remedial-majority in *Booker*, which directed courts to consider all of the section 3553(a) factors, many of which the court found are either rejected or ignored by the guidelines. *Id.* at *1 *(citing Wilson*, 2005 WL 78552 (D. Utah Jan. 13, 2005)). For example, the court found that pursuant to section 3553(a)(1), a sentencing court must consider the history and characteristics of the defendant, but the guidelines forbid or discourage courts from considering the defendant's age, educational and vocational skills, mental and emotional condition, physical condition, drug and alcohol dependence, employment record, family ties, socio-economic status, and civic and military contributions. In the opinion of the court, the guidelines' prohibition or discouragement of these factors cannot square with section 3553(a)(1)'s requirement to evaluate the history and characteristics of the defendant. Because courts must now consider all the section 3553(a) factors, the courts will have to resolve the conflict when the guidelines conflict with the other factors in section 3553(a). *Id.* However, the court acknowledged that courts must seriously consider the guidelines, and because the Commission has collected a great deal of data over the years, courts not imposing sentences within the advisory guideline range should provide an explanation. *Id.* at *2. Additionally, the court stated that the guidelines are not binding and courts need not justify a sentence outside of them by citing factors that take the case outside the "heartland." *Id.* Courts are free to disagree with the guideline range so long as the ultimate sentence is reasonable and carefully supported by reasons tied to the section 3553(a) factors. *Id.*

In the present case, the judge declined to follow the guidelines and instead imposed a sentence which it found was sufficient but not greater than necessary to satisfy the statutory purposes of sentencing. *Id.* The court did consider the guidelines, and came up with a range of 37 to 46 months, with supported enhancements. However, the court rejected this range and instead imposed a sentence of one year and one day. *Id.* at *4. According to the court, in terms of the nature of the offense, while this present offense was serious, it was mitigated by the defendant's lack of personal gain or improper personal gain of another, and there was no harm intended to the bank. Further, the defendant's guideline range was based on the amount of loss, and because he only made loans outside of his lending authority, although he was reckless with his employer's money, it was not the same as stealing it. Thus, in the court's view, the guideline range, which depended on the amount

of loss, was greater than necessary. *Id.* at *5. The court also considered the history and character of the defendant and found he was a single father of two children; had a father with Alzheimer's disease and a mother with depression; he suffered from serious health problems; was not a danger to society and was highly unlikely to re-offend. *Id.* at *6. However, in order to promote respect for the law and because of the significant loss to the bank, the court concluded that the defendant must be confined for a significant period of time. But because the sentence called for by the guidelines was much greater than necessary to satisfy the purposes of sentencing set forth in section 3553(a), and because the guideline range did not properly account for the defendant's absence of interest in any personal gain, the sentence imposed should be below that range. *Id.*

United States v. Galvez-Barrios, 2005 U.S. Dist. LEXIS 1995 (E.D. Wis. Feb. 2, 2005)

In *Galvez-Barrios*, Judge Adelman followed the methodology he first set forth in *United States v. Ranum*, above, in sentencing the defendant who had been convicted of unlawful re-entry. The PSR recommended a guideline range of 41 to 51 months, and the court imposed a 24-month sentence. The court determined first, with respect to the "nature of the offense" factors of section 3553(a), the seriousness of the defendant's illegal re-entry was mitigated by the fact that he committed the crime to support his family, and had not violated the law after he arrived in the United States. *Id.* at *5. Further, with respect to his "history and character" factors, the court found he had paid taxes and filed tax returns, "atypical conduct among the section 1326 defendants I have seen;" his family had encountered financial difficulties in his absence; and he had strong family ties in this country and no such ties in his home country. *Id.* at *6. With respect to the "needs of the public" factors, the court determined a need to promote respect for the immigration law and to deter removed felons from re-entering the country supported a substantial sentence, however, in the view of the court, the defendant was not dangerous and a lengthy incarceration was not necessary to protect the public. *Id.* at *7.

Taking the guidelines into consideration, the court found that the guideline calculation at §2L1.2 was flawed in that it establishes the offense level based on prior convictions, where other Chapter Two guidelines establish the offense level based on the defendant's relevant conduct. After examining the history of the Commission's amendments to §2L1.2, including citing to an article asserting that the Commission had no studies recommending a high level for a prior aggravated felony and that there were no other grounds to warrant the high level, the court stated that it was not sound policy to increase a defendant's sentence twice for his prior record. *Id.* at *12 (*citing* Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent. Rep. 275 (March/Apr. 1996)). Additionally, the court was troubled by the unwarranted sentencing disparity under §2L1.2 for section 1326 offenders due to the fast-track programs in certain judicial districts which did not include the District of Wisconsin. *Id.* at *13 (*citing* Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 262-63 (March/Apr. 2002)). Under *Booker*, the court opined that it may be appropriate in some cases for courts to exercise their discretion to minimize the sentencing disparity that fast-track programs create. *Id.* at *14. In the instant case, the court held the advisory guideline range was "somewhat greater than

necessary" to satisfy the purposes of sentencing and translated the sentence imposed under the section 3553(a) factors into an effective 4 level reduction by analogy to §5K3.1, and a 3-level reduction "based on his motive for re-entering the United States," which it stated "effectively discounted the 16-level enhancement [in §2L1.2], recognized defendant's good character and honorable motive for re-entering, and eliminated unwarranted sentencing disparity, while still treating the offense as a serious one." *Id.* at 17-18. However, the court also effectively increased the defendant's criminal history to a Criminal History Category III to reflect a prior uncharged illegal re-entry offense, which created a 21- to 27-month' guideline range. *Id.* at *18.

United States v. Smith, 2004 U.S.Dist. LEXIS 4177 (E.D. Wis. March 3, 2005)

In *Smith*, Judge Adelman sentenced the defendant who had pleaded guilty to possession with intent to distribute more than 50 grams of cocaine base. *Id.* at *1. The government had moved for a 6-level downward departure based on the defendant's substantial assistance, but Judge Adelman determined a 10-level downward departure was appropriate, based on the defendant "zealously assist[ing]" the government with cooperation that was "enormously useful leading to multiple arrests and convictions;" his controlled buys while repeatedly wearing a wire; the high risk of personal injury involved in his cooperation; and because he provided information that was consistently reliable. *Id.* at *8-11. Judge Aldeman also engaged in a protracted discussion concerning the guideline disparity between cocaine base and powder cocaine, observing the defendant's guideline sentence was driven largely by the weight of the drugs, and courts, commentators and the Commission have long criticized this disparity which "lacks persuasive penological or scientific justification, and creates a racially disparate impact in federal sentencing." *Id.* at *16. The court found the Commission had studied the issue in depth and had concluded that the assumptions underlying the disparity between crack and powder are unsupported by data. *Id.* at *19 (*citing* former Chair Murphy's Statement to Senate Judiciary Committee, May 22, 2002, 14 Fed. Sent. Rtpr. 236, 237 (Nov./Dec. 2001)). Judge Adelman was particularly concerned that the "unjustifiably harsh crack penalties disporportionately impact on black defendants," while noting that the Commission has repeatedly sought to reduce the disparity. *Id.* at *24, 27. Concluding that in the present case adhering to the guidelines would result in a sentence greater than necessary and would create an unwarranted disparity between defendants convicted of possessing powder cocaine and those convicted of possessing crack cocaine, the court sentenced the defendant to a term of 18 months' imprisonment even though the statutory minimum was 10 years. *Id.* at *28.

2. Northern District of Indiana

United States v. Nellum, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. Feb. 3, 2005)

In *Nellum*, the defendant was convicted of distribution of five grams or more of crack cocaine. Judge Simon stated that *Booker* raises the question of how much weight the court should give to the advisory guidelines and the general factors set forth in section 3553(a). *Id.* at *2. The court determined the task is complicated because many of the section 3553(a) factors are factors that the guidelines "either reject or ignore." *Id.* at *3 (*quoting United States v. Ranum*, 2005 WL 161223,

at *1 (E.D. Wis. Jan. 19, 2005)). The court considered all the evidence, reviewed the PSR, and determined the applicable guideline range. In determining the applicable range, the court applied §1B1.3 to find the defendant responsible for more crack cocaine that in the count of conviction, and also applied a gun enhancement even though the guns were not possessed by the defendant during the offense of conviction, based on §1B1.3. After applying the acceptance of responsibility guideline, the defendant faced a guideline range of 168-210 months. *Id.* at *7.

The court next considered the section 3553(a) factors, including the need for the sentence to reflect the seriousness of the offense and the need to deter the defendant and others from committing further crimes. *Id.* The court found that many factors in the deterrence element mitigated the defendant's sentence, including the defendant's age. *Id.* at *9. According to the court, the likelihood of recidivism by someone the defendant's age upon his release is very low, citing to the Commission's Recidivism Report released in May 2004. "Under the guidelines, the age of the offender is not ordinarily relevant in determining the sentence. *See* §5H1.1. But under section 3553(a)(2)(c), age of the offender is plainly relevant to the issue of 'protect[ing] the public from further crimes of the defendant'." *Id.* Further, the court considered the history and characteristics of the defendant, finding he had a good relationship with his children and was a good father, and determined that under the guidelines, family ties are not ordinarily relevant, but under the statute, family ties are pertinent to crafting an appropriate sentence. *Id.* at *10. Additionally, the court stated the evidence from the sentencing hearing "established beyond a doubt" that the defendant was a serious crack addict who supported his habit by selling drugs, and that while under the guidelines, drug addiction is not ordinarily relevant to sentencing, under section 3553(a), the defendant's need for correctional treatment is relevant. The court also found that the defendant had serious medical problems, not relevant under the guidelines, but section 3553(a) and *Booker* require judges to "impose sentences that . . . effectively provide the defendant with needed medical care." *Id.* at *11. Finally, the court found that while the defendant's veteran status was not ordinarily relevant under the guidelines, it was very relevant that he "honorably served this country." *Id.* at *12. The court also considered the nature of the offense, and cited the Commission's Fifteen-Year Report released in November 2004, in which the Commission noted that it had recommended in 2001 the crack cocaine threshold be raised, replacing the 100 to 1 ratio with a 20 to 1 ratio. *Id.* at *12-13. However, the court stated it did not need to address the 100 to 1 ratio in crafting the sentence because it relied on the other factors it was required to take into consideration in arriving at the sentence. *Id.* The court determined that a 108-month sentence, less than the term called for by the guidelines, was sufficient because it protects the public, and provides just punishment and adequate deterrence. *Id.* at *8.

E. Eighth Circuit

Southern District of Iowa

United States v. Myers, 353 F. Supp.2d 1026, 2005 WL 165314 (S.D. Iowa Jan. 26, 2005)

In *Myers*, Judge Pratt recognized that different interpretations of *Booker* have emerged, citing Judge Cassell's opinion in *United States v. Wilson*, 2005 WL 78552 (D. Utah Jan. 13, 2005), in which the court determined that the guidelines are still presumptive and should only be departed from in unusual cases, and Judge Adelman's opinion in *United States v. Ranum*, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005), in which the court concluded the guidelines are not presumptive but advisory, and should be treated as one factor to be considered in conjunction with other factors that are enumerated in section 3553(a). The court adopted Judge Adelman's view, stating "to treat the guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the Guideline range would be presumptively unreasonable in the absence of clearly identified reasons." *Id.* at *1. According to the court, if the guidelines are presumptive they would continue to overshadow the other factors listed in section 3553(a) which would cause an imbalance in the application of the statute to a particular defendant by making the guidelines, in effect, still mandatory. *Id.* Because the court found that the guiding principle in *Booker* is that true uniformity exists "not in a one-size-fits-all scheme, but in 'similar relationships between sentence and real conduct,'" it stated it would endeavor to "square the real conduct presented by the evidence presented concerning a particular defendant, with the public interests expressed through the sentencing statute, in order to deliver a judgment" as even-handed and reasonable as possible. *Id.* at *3.

In the instant case, the defendant was charged with unlawful possession of an illegal firearm after selling a sawed-off shot gun to his cousin in 1974. The cousin then used the sawed-off shotgun to bludgeon someone to death in 2004. The court found that a term of imprisonment was completely unwarranted for this defendant based on these facts and the defendant's exemplary history, aberrant behavior, and other such factors. However, the court found that out of respect for the fact that a violation of federal law occurred, and to deter others from committing similar acts, the defendant should be sentenced to three months' probation. *Id.* at *6.

III. Advisory Guideline Sentence Followed

This memo discusses the opinions of three district court judges in two circuits who have followed the post-*Booker* advisory guideline range. The first is Judge Woodcock in the District of Maine, followed by Judge Woodlock in the District of Massachusetts, both in the First Circuit, and Judge Keenan, in the Southern District of New York in the Second Circuit, in an opinion at odds with his fellow judge's opinion in *United States v. West*.

A. First Circuit

1. District of Maine

United States v. Beal, 352 F. Supp.2d 14, 2005 WL 112402 (D. Me. Jan 19, 2005)

In a footnote, Judge Woodcock acknowledged that *Booker* states a court must consult the guidelines and take them into account when sentencing. The court applied §5K2.12's requirements, and denied the defendant's motion for a downward departure. *Id.* at *1.

United States v. Davis, 353 F. Supp.2d 91, 2005 WL 91257 (D. Me. Jan 18, 2005)

In a footnote, Judge Woodcock acknowledged that the court is not bound by the guidelines but must consult them and take them into account when sentencing. The court found that the defendant's prior conviction for a state crime was a crime of violence under §§2K2.1(a) and 4B1.2. *Id.* at *1.

2. District of Massachusetts

United States v. Ziskind, 2005 WL 181881 (D. Mass. Jan. 25, 2005)

In *Ziskind*, the defendant moved for a stay of execution of his sentence, claiming *Booker* cast doubt on the integrity of the jury's verdict and the propriety of his sentence. Without any discussion explaining his reasoning, Judge Woodlock stated "[t]reating the guidelines [as advisory], I find that the sentence imposed under the mandatory guidelines scheme would in all likelihood be the sentence I would impose under an advisory guidelines sentencing scheme. Consequently, I am of the view that refinement of federal sentencing guidelines law provided by *Booker* is of no particular assistance in supporting the defendant's claims of material impropriety in his sentence." *Id.* at *2.

B. Second Circuit

Southern District of New York

United States v. Ochoa-Suarez, 2005 WL 287400 (S.D.N.Y. Feb. 7, 2005)

Judge Keenan found that the sentence he originally imposed the day before *Booker* was decided, which concluded that the defendant qualified as a manager or supervisor under §3B1.1, must be set aside after *Booker* because there was no finding beyond a reasonable doubt by the jury on those facts. *Id.* at *2. Therefore, the court rejected the enhancement under the now-advisory guidelines for the role in the offense. The defendant had also asserted that she qualified for the safety valve under 18 U.S.C. § 3553(f), but the court held that *Booker* did not affect the application of that provision in this case. The court found that the defendant did not meet the five criteria to qualify, in part, because testimony at the *Fatico* hearing disclosed she was a manager and supervisor

in the criminal activity for safety-valve purposes, and the enterprise was a continuing one. In the court's view, this has nothing to do with the guidelines which are not implicated by the mandatory minimum statute. *Id.* The resulting guideline range applicable to the defendant was a level 31, with a criminal history category I, for a guideline total of 108 to 135 months. The judge then imposed the ten-year mandatory minimum sentence. *Id.*

IV. Sentencing Allegations Listed in Indictments; Surplusage

A. First Circuit

District of Maine

United States v. Cormier, 2005 WL 213513 (D. Me. Jan. 28, 2005)

In *Cormier*, the defendant moved to strike the section in his indictment entitled "Sentencing Allegations." Concluding the sentencing allegations contained in the indictment were surplusage, Judge Woodcock ordered they be striken, pursuant to Fed.R.Crim.P. 7(d). *Id.* at *1. The court recognized its holding was inapposite to its post-*Blakely* holding in *United States v. Baert*, 2004 WL 2009275, at *1 (D. Me. Sept. 8, 2004), which stated "[g]iven this District's interpretation of *Blakely* . . . the government must include such allegations in order to obtain what it considers an appropriate sentence under the . . . guidelines," but asserted that in light of *Booker*, the defendant's Motion to Strike the allegations must be granted. *Id.* at *2 *(citing United States v. Dose*, 2005 WL 106493 (N.D. Iowa Jan. 12, 2005), below). The court's reasoning was that with an advisory guideline scheme, none of the facts contained in the Sentencing Allegations portion of the indictment must be proven to the jury in order for the court to consider them at sentencing, and therefore the Allegations were surplusage. *Id.* In the instant case, the Sentencing Allegations alleged a drug quantity, and while the court acknowledged drug quantity is an element of the offense for a violation of 21 U.S.C. § 841, it stated that the indictment referred to the drug amounts in the specific penalty provisions, and that prejudice exists when an indictment sets out drug amounts in a separate and prominent sentencing section. *Id.* at *4.

B. Sixth Circuit

Eastern District of Michigan

United States v. Dottery, 353 F. Supp.2d 894, 2005 U.S. Dist. LEXIS 1071 (E.D. Mich. Jan. 24, 2005)

In *Dottery*, the grand jury returned a superceding indictment which added additional facts to address "sentencing factors" that could be relevant to determining the sentencing range under the guidelines. *Id.* at *3-4. Judge Lawson stated that the court did not need to decide whether this practice amounted to prosecutorial misconduct because *Booker* rendered the addition of sentencing factors to the indictment unnecessary. *Id.*

C. Eighth Circuit

Northern District of Iowa

United States v. Dose, 2005 U.S. Dist. LEXIS 526 (N.D. Iowa, Jan. 12, 2005)

In *Dose*, Magistrate Judge Zoss recommended that in light of *Booker*, the defendant's Motion to Strike the Notice of Additional Relevant Facts from the superceding indictment be granted, asserting that because the Supreme Court has held the guidelines not mandatory, none of the facts contained in the Notice must be proven to a jury in order for the court to consider those factors at the time of sentencing. Therefore, the judge believed the Notice was surplusage and recommended it be striken. *Id.*

V. New Trial Ordered Due to *Booker* Violations

Sixth Circuit

Northern District of Ohio

United States v. Williams, 2005 WL 323679 (N.D. Ohio Feb. 4, 2005)

In *Williams*, Judge Aldrich found that *Booker* announced a new rule and thus it applies to all criminal cases still pending on direct review, finding that a case announces a new rule "'if the result was not dictated by precedent existing at the time the defendant's conviction became final.'" *Id.* at *5 (*quoting Blakely*, at 2549). Therefore, the court found Booker applied to this defendant's convictions and any sentence that may be imposed. *Id.* The court also found that the defendant was entitled to a new trial because the jury was never expressly charged with finding the amount of loss beyond a reasonable doubt and under *Booker*, that is a fact that must be admitted by the defendant or expressly found by the jury before it may be used to help convict him or to increase his sentence. *Id.* Because the court found that the estimate given by the government's witness on the amount of loss was unreliable, and because the jury will have to decide that same factual issue at sentencing, the jury's consideration of loss when weighing guilt or innocence "cannot be neatly separated from its revisiting the issue for purposes of sentencing. Their factual findings at the two stages of these proceedings are inextricably intertwined." *Id.* The court stated that at all phases of the prosecution, such potentially determinative factual issues concerning the elements of the offense or that necessarily influence their determination of an element "should be expressly submitted to the jury" to find beyond a reasonable doubt. *Id.* at *7. Therefore, the court vacated the defendant's conviction, finding the defendant was entitled to a new trial pursuant to *Blakely* and *Booker*. *Id.*[13]

[13] In a companion case, the court also vacated the codefendant's conviction for the same reasons. *United States v. Rohira*, 2005 WL 323677 (N.D. Ohio, Feb. 4, 2005).

VI. *Booker* Not Retroactive on Collateral Review

Every court that has considered whether *Booker* applies retroactively to cases on collateral review has held that it does not. *See United States v. Green*, 2005 WL 237204, at *1 (2d Cir. Feb. 2, 2005) (finding neither *Blakely* nor *Booker* apply retroactively to collateral challenge; Supreme Court noted holding in case applies to 'all cases on direct review' but made no explicit statement of retroactivity to collateral review."); *United States v. Humphress*, 2005 WL 433191 (6th Cir. Feb. 25, 2005); *McReynolds v. United States*, 397 F.3d 479 (7th Cir. Feb. 2, 2005) (holding *Booker* does not apply retroactively; Supreme Court did not address issue but *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004), was conclusive, where Court held *Ring v. Arizona*, 536 U.S. 584 (2004), not retroactive on collateral review, and finding *Booker*, like *Apprendi* and *Ring*, must be treated as procedural decision for purposes of retroactivity analysis, and procedural rule to be applied retroactively only if establishes watershed rules of criminal procedure and Booker not watershed rule, so not retroactive to cases final before *Booker*); *United States v. Leonard*, 2005 WL 139183, at *1 (10th Cir. Jan. 24, 2005) (finding defendant exhausted direct appeal before *Blakely* was decided, and therefore, *Blakely* and *Booker*, which established new rule of criminal procedure and therefore apply retroactively only to cases pending on direct review, are not applicable); *United States v. Anderson*, 2005 WL 123923, at *1-2 (11th Cir. Jan. 21, 2005) (holding where defendant filed application seeking order allowing district court to consider a second motion under 18 U.S.C. § 2255 and claiming life sentence violated new rules of constitutional law established in *Blakely* and *Booker*, that Supreme Court has not expressly declared *Booker* retroactive on collateral review; Eleventh Circuit previously held Supreme Court did not make *Blakely* retroactive on collateral review for purposes of rules governing filing of successive habeas actions, *Booker* cannot be applied retroactively on collateral review); *Garrish v. United States*, 2005 U.S. Dist. LEXIS 1013, at *1 (D. Me. Jan. 25, 2005) (finding *Blakely* and *Booker* not applicable to cases not on direct appeal when decided; "by its very terms, *Booker* states that it is to apply 'to all cases on direct review'"with no reference to cases on collateral review); *Warren v. United States*, 2005 U.S. Dist. LEXIS 989, at *27 (D. Conn. Jan. 25, 2005) (holding defendant could not be afforded relief under *Blakely* or *Booker*; Supreme Court has not announced *Blakely* to be new rule of constitutional law nor held it applied retroactively on collateral review); *United States v. Williams*, 2005 WL 240939 (E.D. Pa. Jan. 31, 2005) (holding *Booker* not retroactive to cases on collateral review); *United States v. Johnson*, 2005 U.S. Dist. LEXIS 1053, at *1 (E.D. Va. Jan. 21, 2005) (finding *Apprendi*, *Blakely*, and *Booker* do not constitute newly recognized rights by Supreme Court which are made retroactively applicable to cases on collateral review); *United States v. Siegelbaum*, 2005 U.S. Dist. LEXIS 2087 (D. Ore**.** Jan. 26, 2005) (stating Supreme Court has not yet stated whether the rule announced in *Blakely* and *Booker* is retroactive to cases on collateral review, *Blakely* and *Booker* announced a new rule, rule is procedural, and procedural rules are generally not retroactive, but also finding it could not exclude possibility that Supreme Court might apply *Blakely/Booker* retroactively in some situations).